

- B—Division of Parole Report in connection with Violation of Parole referring to Joseph Lanza excluding the part thereof referring to defendant in case on trial*
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- C—A typewritten transcript of conversation had February 7th, 1957, between Joseph Lanza and Mrs. Ellen Lanza and between Joseph Lanza and Sylvester Cosentino at the Westchester County Jail*
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- D—A typewritten transcript of conversation had February 9th, 1957, between Joseph Lanza and Mrs. Joseph Lanza at the Westchester County Jail*
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- E—A typewritten transcript of conversation had February 13, 1957, between Joseph Lanza and Harry Lanza at the Westchester County Jail*
In evidence 217

* Omitted pursuant to Stipulation at page 283.

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New York Supreme Court

1

APPELLATE DIVISION—FIRST DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff-Respondent,

—against—

HARRY LANZA,

Defendant-Appellant.

2

Statement Under Rule 234

This is an appeal by the defendant from a judgment, sentencing him to the Penitentiary of the City of New York for a term of one (1) year on each of nineteen (19) counts (totalling ten (10) years, allowing for concurrent terms), upon his conviction upon each of nineteen (19) counts of the crime of Refusing to Testify in violation of Section 1330 of the Penal Law. Said judgment was rendered on the 20th day of February, 1958, at a term of the Court of General Sessions of the County of New York, after a trial had before the Hon. John A. Mullen, a Judge of said Court without a jury. A certificate of reasonable doubt was granted by the Hon. Samuel Gold, a Justice of the Supreme Court of the State of New York, New York County on February 24th, 1958, and the said defendant was admitted to bail in the sum of one thousand (\$1,000) dollars.

3

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1961

No. 236

HENRY LANZA, PETITIONER,

vs.

NEW YORK.

**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK**

**PETITION FOR CERTIORARI FILED JULY 17, 1961
CERTIORARI GRANTED NOVEMBER 20, 1961**

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- 4—Typewritten transcript of proceedings on June 19, 1957 of Joint Legislative Committee on Government Operations*
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- (Re Harry Lanza: ^(PER STIPULATION) ~~Portions~~ read into Record, pages 94-134)
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- 5—Original Stenographic Notes of People's Exhibit 4 for identification
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- (Portions read into Record, pages 78-81 and 84-86)
- 6—Copy of notice of a proceeding entitled "Inquiry and Investigation of the New York State Joint Legislative Committee on Government Operations into the Parole of Joseph Lanza" served on the Attorney General of the State of New York, District Attorneys of New York and Westchester Counties*
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- A—Written Waiver of Trial by Jury signed by defendant as provided in Article I, Section 2 of the Constitution of the State of New York
- In evidence 46
- (Read into Record, pages 45-46)

* Omitted pursuant to Stipulation at page 283.

4

Statement Under Rule 234

The Indictment herein charging said defendant with each of nineteen (19) counts of the crime of Refusing To Testify was filed in the said Court of General Sessions on the 28th day of June, 1957. Issue was joined by the plea of Not Guilty entered by said defendant on July 1st, 1957.

5

Hon. Frank S. Hogan, District Attorney of the County of New York, represented the People herein, and Michael P. Drenzo, Esq. represented the defendant at the trial and is his attorney on this appeal.

6

Notice of Appeal

7

COURT OF GENERAL SESSIONS
OF THE COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK

Plaintiff

—against—

HARRY LANZA

8

Defendant

SIRS :

PLEASE TAKE NOTICE, that the above named defendant, Harry Lanza, hereby appeals to the Supreme Court of the State of New York, Appellate Division, First Department, 25th Street and Madison Avenue, New York City, N. Y., from the judgment of conviction entered against him in the Court of General Sessions, held in and for the County of New York, on the 20th day of February, 1958, presided over by the Hon. John A. Mullen, one of the Judges of the said Court, wherein the defendant above named was convicted of violation of Section 1330 of the Penal Law of the State of New York, on nineteen separate counts included in the indictment numbered 2157/1957, and sentenced on each of said respective counts as follows:

9

One year in the New York City Penitentiary on each of the first, second, third, fourth,

10

Notice of Appeal

sixth, eighth, eleventh, twelfth, fourteenth and nineteenth count, each sentence to run consecutively, and one year each on the fifth, seventh, ninth, tenth, thirteenth, fifteenth, sixteenth, seventeenth, and eighteenth of said indictment, to run concurrently with the sentence imposed on the count immediately proceeding each said count, but consecutive to each of the sentences theretofore imposed.

11

Said appeal is taken from each and every part of said judgments of conviction and from the whole thereof.

Dated: New York, February 20, 1958

Yours, etc.,

MICHAEL P. DIRENZO

Attorney for Defendant

Office & P. O. Address

253 Broadway

New York, N. Y.

12

To:

CLERK, SUPREME COURT

Appellate Division, First Department

25th Street and Madison Avenue

New York, N. Y.

HON. FRANK HOGAN

District Attorney, New York County

155 Leonard Street

New York, N. Y.

CLERK, COURT OF GENERAL SESSIONS

100 Centre Street

New York, N. Y.

Indictment

13

COURT OF GENERAL SESSIONS

COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK

—against—

HARRY LANZA,

Defendant.

14

THE GRAND JURY OF THE COUNTY OF NEW YORK, by this indictment, accuse the defendant of the crime of REFUSING TO TESTIFY, in violation of section 1330 of the Penal Law, committed as follows:

On or about April 2, 1955, the Legislature of the State of New York, by concurrent resolution of the Senate and Assembly, created a Joint Legislative Committee on Government Operations, hereinafter called the Joint Committee, with full authority to investigate the management and affairs of any agency of the State government and all questions in relation thereto, to aid the Legislature in consideration and enactment of any necessary remedial legislation. Included within this authority was power to inquire into improper and corrupt practices in the operation of any State agency or in the administration of any State law. To this end, the Joint Committee was authorized to hold hearings, summon witnesses and take testimony.

15

Indictment

16

In the month of March, 1957, the Joint Committee duly undertook an investigation into the circumstances relating to the arrest of one Joseph Lanza for violation of parole on February 5, 1957, and his restoration to parole on February 19, 1957, in order to determine whether, in connection therewith, there existed a criminal conspiracy to obstruct justice and to pervert the due administration of the laws, and whether any public officer had been bribed.

17

On June 19, 1957, in the County of New York, the defendant, being present and duly sworn as a witness before said Joint Committee in connection with the aforesaid investigation and inquiry, wilfully refused to answer the following material and proper question:

18

"Q. On February 5, 1957, your brother Joseph Lanza was arrested and returned to prison charged with a violation of parole. Tell the committee, please, any and all efforts extended *by you to assist in obtaining the release of your brother Joseph Lanza on parole or his restoration to parole."

SECOND COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse the defendant of the crime

* As amended on motion of Assistant District Attorney Alfred J. Scotti, the defendant in person and his attorney Michael P. Direnzo consenting, by substituting the word "by" for the word "to" where indicated. So ordered by the Court. (Page 47 of Printed Record.)

Indictment

19

of REFUSING TO TESTIFY, in violation of section 1330 of the Penal Law, committed as follows:

On or about April 2, 1955, the Legislature of the State of New York by concurrent resolution of the Senate and Assembly, created a Joint Legislative Committee on Government Operations, hereinafter called the Joint Committee, with full authority to investigate the management and affairs of any agency of the State government and all questions in relation thereto, to aid the Legislature in consideration and enactment of any necessary remedial legislation. Included within this authority was power to inquire into improper and corrupt practices in the operation of any State agency or in the administration of any State law. To this end, the Joint Committee was authorized to hold hearings, summon witnesses and take testimony. 20

In the month of March, 1957, the Joint Committee duly undertook an investigation into the circumstances relating to the arrest of one Joseph Lanza for violation of parole on February 5, 1957, and his restoration to parole on February 19, 1957, in order to determine whether, in connection therewith, there existed a criminal conspiracy to obstruct justice and to pervert the due administration of the laws, and whether any public officer had been bribed. 21

On June 19, 1957, in the County of New York, the defendant, being present and duly sworn as a witness before said Joint Committee in connection with the aforesaid investigation and inquiry,

Indictment

wilfully refused to answer the following material and proper question

“Q. Did you have a conversation with your brother Joseph Lanza on February 13, 1957, at the Westchester County Jail?”

THIRD COUNT:

23 AND THE GRAND JURY AFORESAID, by this indictment, further accuse the defendant of the crime of REFUSING TO TESTIFY, in violation of section 1330 of the Penal Law, committed as follows:

24 On or about April 2, 1955, the Legislature of the State of New York, by concurrent resolution of the Senate and Assembly, created a Joint Legislative Committee on Government Operations, hereinafter called the Joint Committee, with full authority to investigate the management and affairs of any agency of the State government and all questions in relation thereto, to aid the Legislature in consideration and enactment of any necessary remedial legislation. Included within this authority was power to inquire into improper and corrupt practices in the operation of any State agency or in the administration of any State law. To this end, the Joint Committee was authorized to hold hearings, summon witnesses and take testimony.

In the month of March, 1957, the Joint Committee duly undertook an investigation into the circumstances relating to the arrest of one Joseph Lanza for violation of parole on February 5, 1957, and his restoration to parole on February

Indictment

25

19, 1957, in order to determine whether, in connection therewith, there existed a criminal conspiracy to obstruct justice and to pervert the due administration of the laws, and whether any public officer had been bribed.

On June 19, 1957, in the County of New York, the defendant, being present and duly sworn as a witness before said Joint Committee in connection with the aforesaid investigation and inquiry, wilfully refused to answer the following material and proper question:

26

"Q. Did you on that occasion tell your brother Joseph Lanza what you had done and what you were doing in connection with attempting to obtain his restoration to parole?"

FOURTH COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse the defendant of the crime of REFUSING TO TESTIFY, in violation of section 1330 of the Penal Law, committed as follows:

27

On or about April 2, 1955, the Legislature of the State of New York, by concurrent resolution of the Senate and Assembly, created a Joint Legislative Committee on Government Operations, hereinafter called the Joint Committee, with full authority to investigate the management and affairs of any agency of the State government and all questions in relation thereto, to aid the Legislature in consideration and enactment of any necessary remedial legislation. Included within this authority was power to inquire into

improper and corrupt practices in the operation of any State agency or in the administration of any State law. To this end, the Joint Committee was authorized to hold hearings, summon witnesses and take testimony.

29 In the month of March, 1957, the Joint Committee duly undertook an investigation into the circumstances relating to the arrest of one Joseph Lanza for violation of parole on February 5, 1957, and his restoration to parole on February 19, 1957, in order to determine whether, in connection therewith, there existed a criminal conspiracy to obstruct justice and to pervert the due administration of the laws, and whether any public officer had been bribed.

30 On June 19, 1957, in the County of New York, the defendant, being present and duly sworn as a witness before said Joint Committee in connection with the aforesaid investigation and inquiry, wilfully refused to answer the following material and proper question:

“Q Did you on that occasion tell your brother ‘because they wanted to speed up the thing, you know, and wanted to get a chance’ and did your brother on that occasion answer, ‘Yes, that’s right, it’s all right. Working good. You know what I mean.’ ”

FIFTH COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse the defendant of the crime

of REFUSING TO TESTIFY, in violation of section 1330 of the Penal Law, committed as follows:

On or about April 2, 1955, the Legislature of the State of New York, by concurrent resolution of the Senate and Assembly, created a Joint Legislative Committee on Government Operations, hereinafter called the Joint Committee, with full authority to investigate the management and affairs of any agency of the State government and all questions in relation thereto, to aid the Legislature in consideration and enactment of any necessary remedial legislation. Included within this authority was power to inquire into improper and corrupt practices in the operation of any State agency or in the administration of any State law. To this end, the Joint Committee was authorized to hold hearings, summon witnesses and take testimony. 32

In the month of March, 1957, the Joint Committee duly undertook an investigation into the circumstances relating to the arrest of one Joseph Lanza for violation of parole on February 5, 1957, and his restoration to parole on February 19, 1957, in order to determine whether, in connection therewith, there existed a criminal conspiracy to obstruct justice and to pervert the due administration of the laws, and whether any public officer had been bribed. 33

On June 19, 1957, in the County of New York, the defendant, being present and duly sworn as a witness before said Joint Committee in connection with the aforesaid investigation and inquiry,

34

Indictment

wilfully refused to answer the following material and proper question:

“Q. When you said ‘They wanted to speed the thing up,’ were you talking about speeding up the disposition of the violation of parole charge then existing against your brother Joseph Lanza?”

SIXTH COUNT:

35

AND THE GRAND JURY AFORESAID, by this indictment, further accuse the defendant of the crime of REFUSING TO TESTIFY, in violation of section 1330 of the Penal Law, committed as follows:

36

On or about April 2, 1955, the Legislature of the State of New York, by concurrent resolution of the Senate and Assembly, created a Joint Legislative Committee on Government Operations, hereinafter called the Joint Committee, with full authority to investigate the management and affairs of any agency of the State government and all questions in relation thereto, to aid the Legislature in consideration and enactment of any necessary remedial legislation. Included within this authority was power to inquire into improper and corrupt practices in the operation of any State agency or in the administration of any State law. To this end, the Joint Committee was authorized to hold hearings, summon witnesses and take testimony.

In the month of March, 1957, the Joint Committee duly undertook an investigation into the

circumstances relating to the arrest of one Joseph Lanza for violation of parole on February 5, 1957, and his restoration to parole on February 19, 1957, in order to determine whether, in connection therewith, there existed a criminal conspiracy to obstruct justice and to pervert the due administration of the laws, and whether any public officer had been bribed.

On June 19, 1957, in the County of New York, the defendant, being present and duly sworn as a witness before said Joint Committee in connection with the aforesaid investigation and inquiry, wilfully refused to answer the following material and proper question:

38

"Q. Did you tell your brother Joseph Lanza that Mr. Dwyer of the New York State Division of Parole was responsible for the charge that was being made against your brother Joseph Lanza?"

SEVENTH COUNT:

39

AND THE GRAND JURY AFORESAID, by this indictment, further accuse the defendant of the crime of REFUSING TO TESTIFY, in violation of section 1330 of the Penal Law, committed as follows:

On or about April 2, 1955, the Legislature of the State of New York, by concurrent resolution of the Senate and Assembly, created a Joint Legislative Committee on Government Operations, hereinafter called the Joint Committee, with full authority to investigate the management and af-

fairs of any agency of the State government and all questions in relation thereto, to aid the Legislature in consideration and enactment of any necessary remedial legislation. Included within this authority was power to inquire into improper and corrupt practices in the operation of any State agency or in the administration of any State law. To this end, the Joint Committee was authorized to hold hearings, summon witnesses and take testimony.

41

In the month of March, 1957, the Joint Committee duly undertook an investigation into the circumstances relating to the arrest of one Joseph Lanza for violation of parole on February 5, 1957, and his restoration to parole on February 19, 1957, in order to determine whether, in connection therewith, there existed a criminal conspiracy to obstruct justice and to pervert the due administration of the laws, and whether any public officer had been bribed.

42

On June 19, 1957, in the County of New York, the defendant, being present and duly sworn as a witness before said Joint Committee in connection with the aforesaid investigation and inquiry, wilfully refused to answer the following material and proper question:

"Q. How did you know, Mr. Lanza, that Mr. Dwyer was responsible for the bringing of these charges against your brother, Joseph Lanza?"

EIGHTH COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse the defendant of the crime of REFUSING TO TESTIFY, in violation of section 1330 of the Penal Law, committed as follows:

On or about April 2, 1955, the Legislature of the State of New York, by concurrent resolution of the Senate and Assembly, created a Joint Legislative Committee on Government Operations, hereinafter called the Joint Committee, with full authority to investigate the management and affairs of any agency of the State government and all questions in relation thereto, to aid the Legislature in consideration and enactment of any necessary remedial legislation. Included within this authority was power to inquire into improper and corrupt practices in the operation of any State agency or in the administration of any State law. To this end, the Joint Committee was authorized to hold hearings, summon witnesses and take testimony.

44

45

In the month of March, 1957, the Joint Committee duly undertook an investigation into the circumstances relating to the arrest of one Joseph Lanza for violation of parole on February 5, 1957, and his restoration to parole on February 19, 1957, in order to determine whether, in connection therewith, there existed a criminal conspiracy to obstruct justice and to pervert the due administration of the laws, and whether any public officer had been bribed.

Indictment

On June 19, 1957, in the County of New York, the defendant, being present and duly sworn as a witness before said Joint Committee in connection with the aforesaid investigation and inquiry, wilfully refused to answer the following material and proper question:

“Q. On that same occasion did you tell your brother in Italian, ‘They wanted to know whether one of the big ones came, understand?’ And did your brother reply to you and by your brother I mean Joseph Lanza, ‘Well, did you see him? He is sitting this week.’

Did that conversation take place?”

NINTH COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse the defendant of the crime of REFUSING TO TESTIFY, in violation of section 1330 of the Penal Law, committed as follows:

On or about April 2, 1955, the Legislature of the State of New York, by concurrent resolution of the Senate and Assembly, created a Joint Legislative Committee on Government Operations, hereinafter called the Joint Committee, with full authority to investigate the management and affairs of any agency of the State government and all questions in relation thereto, to aid the Legislature in consideration and enactment of any necessary remedial legislation. Included within this authority was power to inquire into improper and corrupt practices in the operation of any

State agency or in the administration of any State law. To this end, the Joint Committee was authorized to hold hearings, summon witnesses and take testimony.

In the month of March, 1957, the Joint Committee duly undertook an investigation into the circumstances relating to the arrest of one Joseph Lanza for violation of parole on February 5, 1957, and his restoration to parole on February 19, 1957, in order to determine whether, in connection therewith, there existed a criminal conspiracy to obstruct justice and to pervert the due administration of the laws, and whether any public officer had been bribed. 50

On June 19, 1957, in the County of New York, the defendant, being present and duly sworn as a witness before said Joint Committee in connection with the aforesaid investigation and inquiry, wilfully refused to answer the following material and proper questions:

“Q. When you used the expression ‘They wanted to know whether one of the big ones came,’ were you talking about one of the commissioners of Parole of the State of New York?” 51

TENTH COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse the defendant of the crime of REFUSING TO TESTIFY, in violation of section 1330 of the Penal Law, committed as follows:

52

Indictment

On or about April 2, 1955, the Legislature of the State of New York, by concurrent resolution of the Senate and Assembly, created a Joint Legislative Committee on Government Operations, hereinafter called the Joint Committee, with full authority to investigate the management and affairs of any agency of the State government and all questions in relation thereto, to aid the Legislature in consideration and enactment of any necessary remedial legislation. Included within this authority was power to inquire into improper and corrupt practices in the operation of any State agency or in the administration of any State law. To this end, the Joint Committee was authorized to hold hearings, summon witnesses and take testimony.

53

In the month of March, 1957, the Joint Committee duly undertook an investigation into the circumstances relating to the arrest of one Joseph Lanza for violation of parole on February 5, 1957, and his restoration to parole on February 19, 1957, in order to determine whether, in connection therewith, there existed a criminal conspiracy to obstruct justice and to pervert the due administration of the laws, and whether any public officer had been bribed.

54

On June 19, 1957, in the County of New York, the defendant, being present and duly sworn as a witness before said Joint Committee in connection with the aforesaid investigation and inquiry, wilfully refused to answer the following material and proper questions:

“Q. When your brother Joseph Lanza said, ‘Well, did you see him, he is sitting this week,’ did you understand him to mean that the person that was sitting this week was a commissioner of Parole of the State of New York?”

ELEVENTH COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse the defendant of the crime of REFUSING TO TESTIFY, in violation of section 1330 of the Penal Law, committed as follows:

56

On or about April 2, 1955, the Legislature of the State of New York, by concurrent resolution of the Senate and Assembly, created a Joint Legislative Committee on Government Operations, hereinafter called the Joint Committee, with full authority to investigate ~~the~~ management and affairs of any agency of the State government and all questions in relation thereto, to aid the Legislature in consideration and enactment of any necessary remedial legislation. Included within this authority was power to inquire into improper and corrupt practices in the operation of any State agency or in the administration of any State law. To this end, the Joint Committee was authorized to hold hearings, summon witnesses and take testimony.

57

In the month of March, 1957, the Joint Committee duly undertook an investigation into the circumstances relating to the arrest of one Joseph Lanza for violation of parole on February 19,

Indictment

58

1957, in order to determine whether, in connection therewith, there existed a criminal conspiracy to obstruct justice and to pervert the due administration of the laws, and whether any public officer had been bribed.

On June 19, 1957, in the County of New York, the defendant, being present and duly sworn as a witness before said Joint Committee in connection with the aforesaid investigation and inquiry, wilfully refused to answer the following material and proper question:

59

“Q. Did you then tell your brother Joseph Lanza, ‘Him, No. He is sitting. And they were trying to speed it up, understand, for this week, but he is no good.’”

TWELFTH COUNT:

60

AND THE GRAND JURY AFORESAID, by this indictment, further accuse the defendant of the crime of REFUSING TO TESTIFY, in violation of section 1330 of the Penal Law, committed as follows:

On or about April 2, 1955, the Legislature of the State of New York, by concurrent resolution of the Senate and Assembly, created a Joint Legislative Committee on Government Operations, hereinafter called the Joint Committee, with full authority to investigate the management and affairs of any agency of the State government and all questions in relation thereto, to aid the Legislature in consideration and enactment of any necessary remedial legislation. Included within this authority was power to inquire into improper

and corrupt practices in the operation of any State agency or in the administration of any State law. To this end, the Joint Committee was authorized to hold hearings, summon witnesses and take testimony.

In the month of March, 1957, the Joint Committee duly undertook an investigation into the circumstances relating to the arrest of one Joseph Lanza for violation of parole on February 19, 1957, in order to determine whether, in connection therewith, there existed a criminal conspiracy to obstruct justice and to pervert the due administration of the laws, and whether any public officer had been bribed. 62

On June 19, 1957, in the County of New York, the defendant, being present and duly sworn as a witness before said Joint Committee in connection with the aforesaid investigation and inquiry, wilfully refused to answer the following material and proper question:

“Q. Were you talking about any officer or employee of the Division of Parole of the State of New York?” 63

THIRTEENTH COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse the defendant of the crime of REFUSING TO TESTIFY, in violation of section 1330 of the Penal Law, committed as follows:

On or about April 2, 1955, the Legislature of the State of New York, by concurrent resolution of the Senate and Assembly, created a Joint Leg-

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Indictment

islative Committee on Government Operations, hereinafter called the Joint Committee, with full authority to investigate the management and affairs of any agency of the State government and all questions in relation thereto, to aid the Legislature in consideration and enactment of any necessary remedial legislation. Included within this authority was power to inquire into improper and corrupt practices in the operation of any State agency or in the administration of any State law.

65 To this end, the Joint Committee was authorized to hold hearings, summon witnesses and take testimony.

66

In the month of March, 1957, the Joint Committee duly undertook an investigation into the circumstances relating to the arrest of one Joseph Lanza for violation of parole on February 19, 1957, in order to determine whether, in connection therewith, there existed a criminal conspiracy to obstruct justice and to pervert the due administration of the laws, and whether any public officer had been bribed.

On June 19, 1957, in the County of New York, the defendant, being present and duly sworn as a witness before said Joint Committee in connection with the aforesaid investigation and inquiry, wilfully refused to answer the following material and proper question:

“Q. In the portion of your conversation just quoted, were you talking about trying to speed up the disposition of the charge of violation of parole in the case of Joseph Lanza?”

FOURTEENTH COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse the defendant of the crime of REFUSING TO TESTIFY, in violation of section 1330 of the Penal Law, committed as follows:

On or about April 2, 1955, the Legislature of the State of New York, by concurrent resolution of the Senate and Assembly, created a Joint Legislative Committee on Government Operations, hereinafter called the Joint Committee, with full authority to investigate the management and affairs of any agency of the State government and all questions in relation thereto, to aid the Legislature in consideration and enactment of any necessary remedial legislation. Included within this authority was power to inquire into improper and corrupt practices in the operation of any State agency or in the administration of any State law. To this end, the Joint Committee was authorized to hold hearings, summon witnesses and take testimony. 68

In the month of March, 1957, the Joint Committee duly undertook an investigation into the circumstances relating to the arrest of one Joseph Lanza for violation of parole on February 19, 1957, in order to determine whether, in connection therewith, there existed a criminal conspiracy to obstruct justice and to pervert the due administration of the laws, and whether any public officer had been bribed. 69

On June 19, 1957, in the County of New York, the defendant, being present and duly sworn as a witness before said Joint Committee in connec-

Indictment

tion with the aforesaid investigation and inquiry, wilfully refused to answer the following material and proper question:

“Q. Now, did you tell your brother Joseph Lanza during that conversation, ‘That one is no good. He is sitting this week and after this week he goes. Then comes Hirsch. Then comes the other, the friend of ours.’ ”

71 FIFTEENTH COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse the defendant of the crime of REFUSING TO TESTIFY, in violation of section 1330 of the Penal Law, committed as follows:

On or about April 2, 1955, the Legislature of the State of New York, by concurrent resolution of the Senate and Assembly, created a Joint Legislative Committee on Government Operations, hereinafter called the Joint Committee, with full authority to investigate the management and affairs of any agency of the State government and all questions in relation thereto, to aid the Legislature in consideration and enactment, of any necessary remedial legislation. Included within this authority was power to inquire into improper and corrupt practices in the operation of any State agency or in the administration of any State law. To this end, the Joint Committee was authorized to hold hearings, summon witnesses and take testimony.

In the month of March, 1957, the Joint Committee duly undertook an investigation into the

Indictment

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circumstances relating to the arrest of one Joseph Lanza for violation of parole on February 5, 1957, and his restoration to parole on February 19, 1957, in order to determine whether, in connection therewith, there existed a criminal conspiracy to obstruct justice and to pervert the due administration of the laws, and whether any public officer had been bribed.

On June 19, 1957, in the County of New York, the defendant, being present and duly sworn as a witness before said Joint Committee in connection with the aforesaid investigation and inquiry, wilfully refused to answer the following material and proper question:

74

“Q. Were you talking about commissioners of parole of the State of New York when you stated what I have just read to you to your brother Joseph Lanza?”

SIXTEENTH COUNT:

75

AND THE GRAND JURY AFORESAID, by this indictment, further accuse the defendant of the crime of REFUSING TO TESTIFY, in violation of section 1330 of the Penal Law, committed as follows:

On or about April 2, 1955, the Legislature of the State of New York, by concurrent resolution of the Senate and Assembly, created a Joint Legislative Committee on Government Operations, hereinafter called the Joint Committee, with full authority to investigate the management and affairs of any agency of the State government and all questions in relation thereto, to aid the Legislature in consideration and enactment, of any

Indictment

necessary remedial legislation. Included within this authority was power to inquire into improper and corrupt practices in the operation of any State agency or in the administration of any State law. To this end, the Joint Committee was authorized to hold hearings, summon witnesses and take testimony.

77

In the month of March, 1957, the Joint Committee duly undertook an investigation into the circumstances relating to the arrest of one Joseph Lanza for violation of parole on February 5, 1957, and his restoration to parole on February 19, 1957, in order to determine whether, in connection therewith, there existed a criminal conspiracy to obstruct justice and to pervert the due administration of the laws, and whether any public officer had been bribed.

78

On June 19, 1957, in the County of New York, the defendant, being present and duly sworn as a witness before said Joint Committee in connection with the aforesaid investigation and inquiry, wilfully refused to answer the following material and proper question:

"Q. When you said 'He is sitting this week and after this week he goes,' about whom were you talking?"

SEVENTEENTH COUNT:

AND THE GRAND JURY AFORESAID, by this indictment, further accuse the defendant of the crime of REFUSING TO TESTIFY, in violation of section 1330 of the Penal Law, committed as follows:

Indictment

79

On or about April 2, 1955, the Legislature of the State of New York, by concurrent resolution of the Senate and Assembly, created a Joint Legislative Committee on Government Operations, hereinafter called the Joint Committee, with full authority to investigate the management and affairs of any agency of the State Government and all questions in relation thereto, to aid the Legislature in consideration and enactment, of any necessary remedial legislation. Included within this authority was power to inquire into improper and corrupt practices in the operation of any State agency or in the administration of any State law. To this end, the Joint Committee was authorized to hold hearings, summon witnesses and take testimony. 80

In the month of March, 1957, the Joint Committee duly undertook an investigation into the circumstances relating to the arrest of one Joseph Lanza for violation of parole on February 5, 1957, and his restoration to parole on February 19, 1957, in order to determine whether, in connection therewith, there existed a criminal conspiracy to obstruct justice and to pervert the due administration of the laws, and whether any public officer had been bribed. 81

On June 19, 1957, in the County of New York, the defendant, being present and duly sworn as a witness before said Joint Committee in connection with the aforesaid investigation and inquiry, wilfully refused to answer the following material and proper question:

Indictment

"Q. When you said 'Then comes the other, the* friend of ours,' about whom were you talking?"

**** EIGHTEENTH COUNT:**

AND THE GRAND JURY AFORESAID, by this indictment, further accuse the defendant of the crime of REFUSING TO TESTIFY, in violation of section 1330 of the Penal Law, committed as follows:

83

On or about April 2, 1955, the Legislature of the State of New York, by concurrent resolution of the Senate and Assembly, created a Joint Legislative Committee on Government Operations, hereinafter called the Joint Committee, with full authority to investigate the management and affairs of any agency of the State Government and all questions in relation thereto, to aid the Legislature in consideration and enactment, of any necessary remedial legislation. Included within this authority was power to inquire into improper and corrupt practices in the operation of any State agency or in the administration of any State law. To this end, the Joint Committee was authorized to hold hearings, summon witnesses and take testimony.

84

* As amended on motion of Assistant District Attorney Alfred J. Scotti, the defendant in person and his attorney, Michael P. Drenzo, consenting, by inserting the word "the" where indicated. So ordered by the Court. (Pages 47-48 of Printed Record.)

** As amended on motion of Assistant District Attorney, Alfred J. Scotti, the defendant in person and his attorney, Michael P. Drenzo, consenting, to read the "Eighteenth Count". So ordered by the Court. (Pages 165-166 of Printed Record.)

Indictment

85

In the month of March, 1957, the Joint Committee duly undertook an investigation into the circumstances relating to the arrest of one Joseph Lanza for violation of parole on February 5, 1957, and his restoration to parole on February 19, 1957, in order to determine whether, in connection therewith, there existed a criminal conspiracy to obstruct justice and to pervert the due administration of the laws, and whether any public officer had been bribed.

86

On June 19, 1957, in the County of New York, the defendant, being present and duly sworn as a witness before said Joint Committee in connection with the aforesaid investigation and inquiry, wilfully refused to answer the following material and proper question:

"Q. Was the person about whom you were talking a commissioner of parole of the State of New York?"

* NINETEENTH COUNT:

87

AND THE GRAND JURY AFORESAID, by this indictment, further accuse the defendant of the crime of REFUSING TO TESTIFY, in violation of section 1330 of the Penal Law, committed as follows:

On or about April 2, 1955, the Legislature of the State of New York, by concurrent resolution of the Senate and Assembly, created a Joint Legislative Committee on Government Operations,

* As amended on motion of Assistant District Attorney Alfred J. Scotti, the defendant in person and his attorney, Michael P. Drenzo, consenting, to read the "Nineteenth Count". So ordered by the Court. (Pages 165-166 of Printed Record.)

Indictment

hereinafter called the Joint Committee, with full authority to investigate the management and affairs of any Agency of the State Government and all questions in relation thereto, to aid the Legislature in consideration and enactment, of any necessary remedial legislation. Included within this authority was power to inquire into improper and corrupt practices in the operation of any State agency or in the administration of any State law. To this end, the Joint Committee was authorized to hold hearings, summon witnesses and take testimony.

In the month of March, 1957, the Joint Committee duly undertook an investigation into the circumstances relating to the arrest of one Joseph Lanza for violation of parole on February 5, 1957, and his restoration to parole on February 19, 1957, in order to determine whether, in connection therewith, there existed a criminal conspiracy to obstruct justice and to pervert the due administration of the laws, and whether any public officer had been bribed.

On June 19, 1957, in the County of New York, the defendant, being present and duly sworn as a witness before said Joint Committee in connection with the aforesaid investigation and inquiry, wilfully refused to answer the following material and proper question:

"Q. Mr. Lanza, please tell the committee the name of anybody with whom you spoke during the month of February 1957 about the restoration to parole of your brother Joseph Lanza."

FRANK S. HOGAN
District Attorney

Endorsements on Indictment

91

IB
No. 2157-57

BW MC Jun 28 1957

THE PEOPLE OF THE STATE OF NEW YORK

—against—

HARRY LANZA, B

92

INDICTMENT

Refusing to Testify
Penal Sec. 1330

FRANK S. HOGAN

District Attorney

A TRUE BILL

93

HARRY MARCUS
Foreman

Filed Part 1 Jun 28, 1957

Part 1 Jul 1 1957

NOTICE OF APPEARANCE

Filed by Michael P. Drenzo

Address 253 Bway

Telephone Be-3 1950

94 *Endorsements on Indictment*

Part Jul 1 1957

Brought into court on bench warrant

Paroled to give bail

L. Mershon

Stenog

ARRAIGNMENT

95 Part Jul 1 1957

Pleads Not Guilty

Name of Counsel Present Michael P. Direnzo

Leave to withdraw or move with respect to indictment by July 15, 1957.

JUDGE GERALD P. CULKIN

BAIL

Part 1 Jul 1 1957

96 Bail fixed at \$1000.00—One Thousand Dollars,
paroled in custody of counsel to give bail until
11 A.M. tomorrow

On Consent of D. A. Eugene A. Leiman

G. P. C.

Judge

R. L. Mershon

Stenog

Bailed July 1, 1957 \$1000

Surety Public Service Mutual Insurance
Company

Endorsements on Indictment

97

TRIAL

Part 7 Jan. 20 1958

Judge John A. Mullen

Asst. Dist. Atty. Alfred Scotti

Stenographer L Frank L Cohan E Morris

Tried without a Jury and the Court finds the
defendant Guilty on all nineteen Counts of the
Indictment

98

Counsel Michael P Drenzo

DEFENDANT'S SWORN PEDIGREE

Residence 25 Tennis Court, Bklyn N.Y.

Age 49 Married Race White

Occupation Produce Dealer in Frozen Foods

Religion C

Born U. S.

99

English Speak ✓

Read ✓

Write ✓ Temperate Moderate

Nativity (Father) Italy (Mother) Italy

Parents Living Dead

Prev. Ct. Record See yellow sheets

Endorsements on Indictment

SENTENCE

Part 8 Feb 20 1958

Michael P. Direnzo, Esq.

Counsel is present.

Emanuel Morris stenographer

JUDGMENT

101

Count 1. Penitentiary of the City of New York
for the Term of One Year

Count 2. Penitentiary one year to run consec-
utively to Count 1—

Count 3. Penitentiary one year to run consec-
utively to Counts 1 & 2

Count 4 Penitentiary one year to run consec-
utively to Counts 1-2 and 3

102

Count 5—Penitentiary one year to run concu-
rently to 4th Count and shall run consecutively
to Counts 1,2-3

Count 6—Penitentiary one year to run consec-
utively to Counts 1-2-3-4 and 5

Count 7—Penitentiary one year to run concu-
rently to 6th Count and consecutively to Counts
1-2-3-4- and 5

Count 8—Penitentiary one year to run consec-
utively to Counts 1-2-3-4-5-6- and 7

Count 9 & 10 Penitentiary one year each to run
concurrently with each other and concurrently

Endorsements on Indictment

103

with Count 8 but consecutively to Counts 1-2-3-4-5-6 and 7

Count 11—Penitentiary one year to run consecutively to Counts 1-2-3-4-5-6-7-8-9- and 10

Count 12—Penitentiary one year to run consecutively to Counts 1-2-3-4-5-6-7-8-9-10- & 11

Count 13—Penitentiary one year to run concurrently with Count 12 and consecutively to Counts 1-2-3-4-5-6-7-8-9-10 and 11

104

Count 14—Penitentiary one year to run consecutively to Counts 1-2-3-4-5-6-7-8-9-10-11-12-13.

Counts 15-16-17 and 18- each Penitentiary one year to run concurrently with each other and concurrently with Count 14 and consecutively to Counts 1-2-3-4-5-6-7-8-9-10-11-12-13

Count 19 Penitentiary one year to run consecutively to Counts 1-2-3-4-5-6-7-8-9-10-11-12-13-14-15-16-17-18.

JOHN A. MULLEN
Judge of the Court of
General Sessions

105

APPEAL RECORD

APPELLATE DIVISION

Notice of Appeal filed Feb 24 1958

106

*Endorsements on Indictment***BAIL PENDING APPEAL**

Date Feb 24 1958 Amount 1000

Cert. Granted By Judge Gold Feb. 24, 1958

Surety Public Service Mutual Insurance
Company

TRIAL AND MOTION CALENDAR

107

Motion Cal. Part 1 Nov 27 1957

Motion Cal. Part 1 Dec 16 1957

Part 3 Dec 5 1957

Part 3 Dec 6 1957

Part 3 Dec 11 1957

Part 7 Jan 7 1858

Part 7 Jan 9 1958

108

**Extract from Clerk's Minutes of Trial
and Judgment**

109

**AT A COURT OF GENERAL SESSIONS
OF THE COUNTY OF NEW YORK,**

Holden in and for the County of New York, at the Building for Criminal Courts, in the Borough of Manhattan of the City of New York, on Thursday, the 16th day of January, the year of our Lord one thousand nine hundred and fifty-eight.

110

Present,

THE HONORABLE JOHN A. MULLEN,
Judge of the Court of General Sessions.

Harry Lanza is in due form of law arraigned at the bar upon an indictment for Refusing to Testify in violation of Section 1330 of the Penal Law, Indictment No. 2157-57, filed June 28th, 1957, and having read the indictment, and being asked whether he demanded a trial thereon, answers that he does require a trial, and says that he is not guilty thereof, and the defendant in person and through his counsel makes application to the Court to waive said trial by jury as provided in Article 1, Section 2 of the Constitution of the State of New York and the formal written waiver of trial by jury is signed by the defendant in open Court and marked Defendant's Exhibit "A" in evidence and read into the Record.

111

By consent further proceedings are adjourned until 12:00 noon tomorrow.

At 4:45 P.M., Court adjourns until 10:00 A.M. tomorrow.

112 *Extract from Clerk's Minutes of Trial
and Judgment*

Monday Morning—January 20th, 1958

Court meets:

Present: As before.

Trial continued from Friday last.

Both sides rest.

113 Counsel for the defendant moves to acquit the defendant on the ground that the People have failed to establish the guilt of the defendant beyond a reasonable doubt. After hearing counsel for the defendant in support and the District Attorney in opposition thereto, the Court denies said motion in all respects.

Thereupon, the Court concludes that the defendant did violate the provisions of Section 1330 of the Penal Law.

The Court orders the defendant to rise.

114 The Court finds the defendant Guilty of the crime of Refusing to Testify in violation of Section 1330 of the Penal Law under each of the nineteen counts contained in the Indictment as aforesaid.

Further proceedings are adjourned to February 20th, 1958, and on motion of counsel for the defendant, the defendant is continued on bail to said date.

Thursday Morning—February 20th, 1958

Court meets: pursuant to adjournment.

Present: As before.

The defendant is arraigned at the bar.

*Extract from Clerk's Minutes of Trial
and Judgment*

115

The District Attorney moves for judgment against the defendant.

It is thereupon demanded of the said Harry Lanza what legal cause he hath to show why judgment should not be pronounced against him according to law, who nothing further saith unless as before he hath said.

Whereupon it is considered, ordered and adjudged by the Court, that the said Harry Lanza for the crimes aforesaid whereof he is convicted as aforesaid, upon his conviction on the first count be imprisoned in the Penitentiary of The City of New York for the term of One (1) Year; and

116

Upon his conviction on the second count, be imprisoned in the Penitentiary for the term of One (1) Year, said sentence to run consecutively to the sentence imposed under the first count; and

Upon his conviction under the third count, be imprisoned in the Penitentiary of The City of New York for the term of One (1) Year, said sentence to run consecutively to the sentences imposed under the first and second counts; and

117

Upon his conviction under the fourth count, be imprisoned in the Penitentiary of the City of New York for the term of One (1) Year, said sentence to run consecutively to the sentences imposed under the first, second, and third counts; and

Upon his conviction under the fifth count be imprisoned in the Penitentiary of the City of New York for the term of One (1) Year, said

118

*Extract from Clerk's Minutes of Trial
and Judgment*

sentence to run concurrently with the sentence imposed under the fourth count, but shall run consecutively to the sentences imposed under the first, second and third counts; and

Upon his conviction under the sixth count be imprisoned in the Penitentiary of the City of New York for the term of One (1) Year, this sentence to run consecutively to the sentences imposed under the first, second, third, fourth, and fifth counts; and

119

Upon his conviction under the seventh count be imprisoned in the Penitentiary of the City of New York for the term of One (1) Year, this sentence to run concurrently with the sentence imposed under the sixth count but shall run consecutively to the sentences imposed under the first, second, third, fourth and fifth counts; and

120

Upon his conviction under the eighth count be imprisoned in the Penitentiary of the City of New York for the term of One (1) Year, this sentence shall run consecutively to the sentences imposed under the first, second, third, fourth, fifth, sixth and seventh counts; and

Upon his conviction under each of the ninth and tenth counts, be imprisoned in the Penitentiary of the City of New York, each of these two sentences to run concurrently with each other and concurrently with the sentence imposed under the eighth count, but shall run consecutively with the sentences imposed under the first, second, third, fourth, fifth, sixth and seventh counts; and

Upon his conviction under the eleventh count, be imprisoned in the Penitentiary of the City of

*Extract from Clerk's Minutes of Trial
and Judgment*

121

New York for the term of One (1) Year, this sentence shall run consecutively to the sentences imposed under the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth and 10th counts; and

Upon his conviction under the twelfth count, be imprisoned in the Penitentiary of the City of New York for the term of One (1) Year; this sentence shall run consecutively to the sentences imposed under the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth and eleventh counts; and

122

Upon his conviction under the thirteenth count, be imprisoned in the Penitentiary of the City of New York for the term of One (1) Year, this sentence shall run concurrently with the sentence imposed under the twelfth count, but shall run consecutively with the sentences imposed under the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth and eleventh counts; and

Upon his conviction under the fourteenth count, be imprisoned in the Penitentiary of the City of New York for the term of One (1) Year; this sentence shall run consecutively to the sentences imposed under the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, ten, eleventh, twelfth and thirteenth counts; and

123

Upon his conviction under each of fifteenth, sixteenth, seventeenth and eighteenth counts be imprisoned in the Penitentiary for the term of One (1) Year, these sentences to run concurrently with each other and concurrently with the sentence imposed under the fourteenth count, but consecutively to the sentences imposed under the

124

*Extract from Clerk's Minutes of Trial
and Judgment*

first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth and thirteenth counts; and

125

Upon his conviction under the nineteenth count be imprisoned in the Penitentiary of the City of New York for the term of One (1) Year, this sentence shall run consecutively to the sentences imposed under the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth and eighteenth counts.

A TRUE EXTRACT FROM THE MINUTES.

F. HOWARD BARRETT
Clerk of Court

126

Testimony

127

**COURT OF GENERAL SESSIONS
OF THE COUNTY OF NEW YORK****PART SEVEN****Indictment 2157—57****THE PEOPLE OF THE STATE OF NEW YORK****—against—**

128

HARRY LANZA,**Defendant.****TRIAL PROCEEDINGS****New York, January 16, 1958.****Before:****HON. JOHN A. MULLEN, J.****Appearances:**

129

For the People:**ALFRED J. SCOTT, Esq., and
FRANCIS X. CLARK, Esq.,
Assistant District Attorneys****For the defendant:****MICHAEL P. DIRENZO, Esq.****Defendant indicted for refusing to testify.
Indictment filed June 28, 1957.**

130

Waiver of Trial by Jury

(The case of Harry Lanza is called by the Clerk on the trial calendar.)

The Court: Are you ready in the Lanza case?

The Clerk: Harry Lanza to the bar.

(The defendant is present with his counsel.)

The Court: Are the People ready?

Mr. Scotti: The People are ready, your Honor.

131

Mr. Direnzo: The defendant is ready, if your Honor pleases.

The Court: Very well, we shall proceed to trial.

Mr. Direnzo: Now, if your Honor pleases, it is the desire of the defendant at this time, in accordance with the provision of Article 1, Section 2, of the Constitution of the State of New York, to waive trial by jury. He has before him now a notice of waiver of trial by jury which has been prepared. I'd like to read it into the record, if possible.

132

The Court: Where is the original?

Mr. Direnzo: I have the original here.

The Court: No, I want the original indictment.

Mr. Direnzo: May we approach the bench, your Honor.

The Court: Yes.

(Off-the-record discussion at the bench between the Court and counsel on both sides, after which the following further proceedings are had):

(The original indictment in this case, number 2157—57, is handed to the Court.)

Defendant's Waiver of Trial by Jury
(Defendant's Exhibit A read into Record)

133

The Court: Harry Lanza, I hand you the original indictment in this case and then ask you whether in respect to that indictment you make the application through your counsel to waive a jury trial, as provided in Article 1, Section 2, of the Constitution of the State of New York?

The Defendant: Yes, sir, I read the copy of the indictment.

The Court: Do you personally make application to waive a trial by jury, as provided for in Article 1, Section 2, of the New York State Constitution?

134

Mr. Drenzo: At this time, if your Honor pleases, the defendant desires to execute the formal written waiver of trial by jury, in accordance with Article 1, Section 2, of the Constitution.

The Court: Let it be noted on the record that the defendant executes the waiver in open court.

Lanza, my attention is called by the stenographer to the fact that you said you had read the copy of the indictment. I showed you the original and asked you with respect to that original indictment. Do you ask that we proceed in this case without a jury, as provided in Article 1, Section 2, of the State Constitution—do you?

135

The Defendant: I do.

Mr. Drenzo: Now, if your Honor pleases, may I read into the record the formal waiver and ask your Honor to approve it?

The Court: Yes.

Mr. Drenzo (reading): "I, Harry Lanza, the defendant named in the above action, hereby in

136

Defendant's Waiver of Trial by Jury
(Defendant's Exhibit A read into Record)

open court, in the presence of my attorney, Michael P. Drenzo, before the Honorable John A. Mullen, a Judge of this court, in Part Seven of said court, pursuant to Article 1, Section 2, of the Constitution of the State of New York, relinquish the right, which I recognize and understand to be mine and which right has been fully explained to me by my said attorney, to wit, to have a trial by jury."

137

Dated New York, January 16, 1958, and signed by the defendant, Harry Lanza.

(Counsel hands waiver to the Court.)

The Court: Harry Lanza, do you, by signing this statement which has just been handed to me by your counsel, understand that the right which you relinquish is the right to a trial by jury?

The Defendant: I do.

138

The Court: And do you understand that relinquishing that, as stated in this certificate, means you are waiving that right?

The Defendant: That's right.

The Court: Very well.

Mr. Scotti: May I suggest, your Honor, that we have that marked as Defendant's Exhibit A in Evidence?

The Court: Do you offer that, Mr. Drenzo?

Mr. Drenzo: I do, your Honor.

(The waiver signed by the defendant is received in evidence and marked Defendant's Exhibit A.)

Mr. Scotti: Before we proceed to trial, your Honor, I would like to make a motion to amend that portion of the first count of the indictment on Page 2 of said indictment, to wit, the question—have you got that?

Mr. Drenzo: All right.

Mr. Scotti: —“Question: On February 5, 1957, your brother Joseph Lanza was arrested and returned to prison charged with a violation of parole. Tell the committee, please, any and all efforts extended to you to assist in obtaining the release of your brother Joseph Lanza on parole or his restoration to parole”—to read as follows: “Question: On February 5th, 1957, your brother Joseph Lanza was arrested and returned to prison charged with a violation of parole. Tell the committee, please, any and all efforts extended by you to assist in obtaining the release of your brother Joseph Lanza on parole or his restoration to parole.” 140

Mr. Drenzo: I have no objection to that amendment, if your Honor pleases, and I stipulate with Mr. Scotti that the allegation be amended to read in the language of his proposed amendment. 141

The Court: “By you” instead of “to you”—do you consent to that, Lanza?

The Defendant: I do.

Mr. Scotti: The People further move to amend that portion of the 18th count of the said indictment on Page 24—no, that’s the 17th count, I am sorry. There are 19 counts but they were improperly numbered, your Honor—

142

The Court: Count No. 17?

Mr. Scotti: It is really Count No. 18; it should be numbered "18", although it is listed here as "19" on Page 24.

The Court: You are referring to the count numbered "19th Count"?

Mr. Scotti: 19th, which should really be "18."

The Court: It is in here as "19"?

143

Mr. Scotti: On Page 24 of said indictment, to wit: "Question: When you said 'Then comes the other, friend of ours,' about whom were you talking?" to read as follows: "Question: When you said 'Then comes the other, the friend of ours,' about whom were you talking?"

Mr. Drenzo: I have no objection to the amendment and will stipulate with Mr. Scotti that the allegation read in accordance with his proposed stipulation.

The Court: And does the defendant Lanza personally consent to that?

The Defendant: Yes, sir.

144

Mr. Scotti: Now, your Honor, I have already shown to Mr. Drenzo, the attorney for Mr. Harry Lanza, a proposed stipulation. I shall read this stipulation:

"It is agreed and stipulated by and between the defendant, Harry Lanza, his attorney, Michael P. Drenzo, and the People of the State of New York that the following members of the Joint Legislative Committee, known as the Committee on Government Operations, voted for a motion made by Assemblyman Corso, as reflected on Pages 1871 and 1872 of the transcript of the in-

terrogation of the defendant Harry Lanza before said committee on June 19, 1957, in the County of New York, namely, that the said Harry Lanza be not excused from testifying and that the witness be ordered to testify, and that if the witness complies with the order to testify, he be granted immunity, as authorized by Sections 2447, 381 and 584 of the Penal Law of the State of New York, so that he shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he might answer or produce evidence, and that no such answer given or evidence produced by him shall be received against him upon any criminal proceedings, to wit: Senator Zaretsky, Senator McGann, Assemblyman Carlino, Assemblyman Bannigan, Assemblyman Horan, Assemblyman Corso and Senator Greenberg."

146

Mr. Drenzo: It is so stipulated.

The Court: Lanza, do you stipulate personally as indicated?

147

The Defendant: I do.

Mr. Scotti: It is further agreed and stipulated by and between the defendant Harry Lanza, his attorney, Michael P. Drenzo, and the People of the State of New York, that the vote cast by Senator Greenberg for said motion was mistakenly or inadvertently unrecorded in the transcript of Harry Lanza's interrogation before the said committee, as reflected on Pages 1872 and 1873 of said transcript.

Mr. Drenzo: I so stipulate.

148 *Arnold Bauman—for People—Direct*

Mr. Scotti: The defendant?

The Defendant: Yes.

Mr. Scotti: May we proceed, your Honor?

The Court: Yes.

Mr. Scotti: Mr. Bauman.

ARNOLD BAUMAN, of 217 Broadway, New York,
N. Y., called as a witness on behalf of The People,
149 being first duly sworn, testified as follows:

Direct Examination by Mr. Scotti:

Q. Mr. Bauman, what is your profession? A.
I am an attorney-at-law. I am chief counsel to
the Joint Legislative Committee on Government
Operations of the Legislature of the State of New
York.

Q. How long have you held this position? A.
Since October 4, 1955.

150 Q. Now, Mr. Bauman, will you please be good
enough to tell us how this committee came into
being? A. The committee came into being as the
result of a resolution which was offered in both
houses of the Legislature and passed in both
houses of the Legislature, creating a Joint Legis-
lative Committee that had certain specified duties
and rights.

Q. Do you recall when that original resolution
was passed? A. I know it was during the year
1955; my recollection is that it was in the Spring
of that year.

Q. Was it re-adopted in 1956? A. It was re-adopted in 1956, except that those powers which the committee already had under the resolution of 1955 were extended and, in addition, the powers of the committee increased.

Q. In other words, the 1956 resolution incorporated the resolution of 1955 but expanded it? A. That's correct.

Q. And was there a re-adoption of the 1956 resolution in 1957? A. There was.

152

Mr. Scotti: At this time I would like to have Mr. Clark read from the New York Legislative Index—

By the Court:

Q. When you say "re-adopted", you mean it was passed by both houses of the Legislature? A. When I say, sir, that it was re-adopted, I mean that in 1957 a resolution was passed in each house of the Legislature continuing the same powers that the committee had in 1956 and extending its life until March 30th—is my recollection—1958.

153

Q. And when you say "in 1956 the 1955 resolution was re-adopted and expanded", you mean by that that in 1956 the resolution was passed again by both houses of the State Legislature, with the same powers as given in 1955 and with certain additional powers? A. Yes, sir, I do.

Mr. Scotti: Your Honor, at this time I would like to have read into the record the exact language of the resolution adopted

154

*Arnold Bauman—for People—Direct**(People's Exhibit 1 for Ident. Read into Record)*

by both houses in 1955, known as "153", reading from Page 64 of the New York Legislative Index. Will you please read it, Mr. Clark.

The Court: Has that been marked for identification?

155

Mr. Scotti: Well, it is the Official Legislative Index. I don't know whether it is necessary to mark it for identification. May we have it so deemed marked for identification, your Honor, and if defense counsel does not object to the reading of it there may not be any need to mark it.

Mr. Durenzo: Take judicial notice.

Mr. Scotti: That's what I am saying. I don't take judicial notice.

The Court: I would like to have this book marked for identification before anything is read from it.

156

(The book referred to—the New York Legislative Index for 1955—is marked People's Exhibit 1 for Identification.)

The Court: Mr. Durenzo and Mr. Lanza, I show you each People's Exhibit 1 for Identification and ask you each do you stipulate that that is a true and correct copy of the original printed resolution?

Mr. Durenzo: I so stipulate, your Honor.

The Court: Mr. Lanza?

The Defendant: I stipulate.

Arnold Bauman—for People—Direct 157
(People's Exhibit 1 for Ident. Read into Record)

The Court: Very well.

Mr. Scotti: Now, may we have the text of that resolution read into the record, your Honor?

The Court: Yes.

Mr. Clark (reading from People's Exhibit 1 for Identification): "Resolution 153"—on Page 664 of the New York Legislative Index for 1955, marked People's Exhibit 1 for Identification, reads as follows: 158

"Be it resolved, if the Assembly concur, that a Joint Legislative Committee, to be known as the Committee on Government Operations, be and hereby is created. The committee shall consist of four members of the Senate, to be appointed by the Temporary President of the Senate, and four members of the Assembly, to be appointed by the Speaker of the Assembly, and shall have full power and authority to investigate, inquire into and examine the management and affairs of any department, board, bureau, commission or other agency of the State, and all questions in relation thereto, to aid the Legislature in the consideration and enactment of any necessary remedial legislation. 159

"For the accomplishment of its purposes the committee shall be authorized and empowered to undertake any studies, inquiries, investigations, surveys or analyses

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it may deem relevant, the scope of which may include but shall not be limited to

“(1) The operation of State government with a view toward determining its economy, efficiency and effectiveness and the changes that may be required to improve the management of its affairs;

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“(2) The administration of State laws and the detection and prevention of unsound, improper or corrupt practices in connection therewith;

“(3) The expenditure and allocation of moneys of the State;

“(4) The letting of contracts and agreements for purchases of supplies and equipment, the rendition of services and the performance of public work;

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“(5) The appointment, promotion, retention, transfer and discharge of officers, employees and agents of the State and the creation and abolition of positions in the State service;

“(6) Such other matters not specifically mentioned in this resolution deemed by the committee relevant to the general question of ascertaining and improving the administration and conduct of governmental affairs.

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“Resolved, if the Assembly concur, that such committee shall organize by the selection from its members of a chairman, a vice chairman and a secretary, and shall employ and may at pleasure remove counsel, consultants and such other personnel as it may deem necessary and fix their compensation within the amount made available therefor. Any vacancy in the membership of the committee shall be filled by the officer authorized to make the original appointment.

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“The members of the committee shall serve without compensation for their services but shall be entitled to their actual expenses incurred in the performance of their duties.

“The committee may request, and shall receive, from all public offices, departments and agencies of the State and its political subdivisions such assistance and data as will enable it properly to consummate its work.

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“The committee may meet within and without the State, hold public or private hearings, take testimony, subpoena witnesses and require the production of books, records and papers and shall have all the powers of a legislative committee as provided by the legislative law.

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“And be it further resolved, if the Assembly concur, that the committee shall report to the Legislature on or before March 1st, 1956, the result of its study and investigation and shall submit with its report such legislative and other proposals as it may deem necessary to make its recommendations effective;

167 “And be it further resolved, if the Assembly concur, that the sum of \$75,000, or so much thereof as may be necessary, is hereby allocated from the legislative contingent fund and made immediately available to pay the expenses of such committee, including personal service, in carrying out the provisions of this resolution. Such moneys shall be payable after audit and upon the warrant of the comptroller on vouchers certified or approved by the chairman of the committee and/or other officer or member of the committee designated by him in the manner provided by law.

168 “To Finance Committee, April 1, report adopted.

“In Assembly Rules Committee, April 2, report adopted.”

Mr. Scotti: At this time, your Honor, I would like to have read into the record Resolution No. 114 of February 21st, 1956,

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as reflected in the Legislative Index on Page 743. May we have this marked People's Exhibit 2 for Identification?

The Court: Mark it.

(The book referred to—the New York Legislative Index for 1956—is marked People's Exhibit 2 for identification.)

The Court: Is it stipulated by defense counsel and the defendant that People's Exhibit 2 is a correct copy of resolution adopted by the Legislature in 1956?

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Mr. Drenzo: So stipulated.

The Court: Mr. Lanza?

The Defendant: Yes.

Mr. Scotti: That is on Page 743, Resolution No. 114. Will you please read it, Mr. Clark.

Mr. Clark: Resolution 114 of the New York State Senate, as appears on Page 743 of People's Exhibit 2 for Identification, the New York Legislative Index for 1956, reads as follows:

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“Resolved, if the Assembly concur, that the Joint Legislative Committee on Government Operations, created by concurrent resolution adopted April 2nd, 1955, be and hereby is continued with all of its present powers and duties and the additional powers and duties hereinafter specified, that

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the time for such committee to make its report to the Legislature be and the same hereby is extended to and including the 31st day of March, 1957;

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“And be it further resolved, if the Assembly concur, that in addition to its present powers and duties the said committee shall have full power and authority to investigate, inquire into and examine the management and affairs of any department, board, bureau, commission or other agency of any county, town, city, village or other municipal corporation or political subdivision of the State, and all questions in relation thereto, to aid the Legislature in the consideration and enactment of any necessary remedial legislation.

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“For the accomplishment of said additional purposes, the committee is authorized and empowered to undertake any studies, inquiries, investigations, surveys or analyses it may deem relevant, the scope of which may include but shall not be limited to:

“(1) the operation of the government of the said municipal corporations and political subdivisions with a view toward determining their economy, efficiency and effectiveness and the changes that may be re-

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quired to improve the management of their affairs;

“(2) the administration of State and local laws and the detection and prevention of unsound, improper or corrupt practices in connection therewith;

“(3) the expenditure and allocation of monies of such municipal corporations and political subdivisions;

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“(4) the letting of contracts and agreements for purchases of supplies and equipment, the rendition of services and the performance of public work by such municipal corporations and political subdivisions;

“(5) the appointment, promotion, retention, transfer and discharge of officers, employees and agents of such municipal corporations and political subdivisions, and the creation and abolition of positions in the service of such municipal corporations and political subdivisions;

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“(6) such other matters, not specified in this resolution, deemed by the committee relevant to the general question of ascertaining and improving the administration and conduct of the governmental affairs of such municipal corporations and political subdivisions.

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“In respect to the additional powers hereby granted, the committee may meet within and without the state; hold public or private hearings, take testimony, subpoena witnesses and require the production of books, records and papers and shall have all the powers of a legislative committee as provided by the legislative law, and be it further

179 “Resolved (if the Assembly concur), That the sum of \$250,000, or so much thereof as may be necessary, is hereby appropriated from the legislative contingent fund together with any unexpended balance of the fund heretofore appropriated, which is hereby reappropriated, and made immediately available to pay the expenses of such committee, including personal service, in carrying out the provisions of this resolution. Such money shall be payable after
 180 audit and upon warrant of the comptroller on vouchers certified or approved by the chairman of the committee, or other officer or member of the committee designated by him, in the manner provided by law.

“To Finance Committee. Report Adopted. February 22. Assembly. To Ways and Means Committee. February 28. Report Adopted.”

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(People's Exhibit 3 for Iden. Read into Record)

Mr. Scotti: Now, your Honor, I also would like to have read into the record Resolution 203, adopted on March 29, 1957, in the Senate and adopted on March 30, 1957, in the Assembly.

Mr. Clark: May we have this marked as People's Exhibit 3 for Identification, your Honor?

The Court: Yes, mark it for identification. 182

(The book referred to—the New York Legislative Index for 1957—is marked People's Exhibit 3 for Identification.)

The Court: Do counsel for the defendant and the defendant personally stipulate that People's Exhibit 3 for Identification contains a true and correct copy of the resolution actually adopted by the Senate and the Assembly? 183

Mr. Drenzo: So stipulated.

The Defendant: Yes.

The Court: Which resolution has been referred to by the District Attorney in his question?

Mr. Scotti: That's correct.

Mr. Clark: Resolution Number 203 as it appears on Page 932 of the New York Legislative Index for 1957, marked as People's Exhibit 3 for Identification, reads as follows:

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“Resolved (if the Senate concur, That the Joint Legislative Committee on Government Operations created by concurrent resolution adopted April second, 1955, be, and hereby is, continued with all of its present powers and duties and with the additional powers and duties of making studies, inquiries, investigations, surveys and analyses it may deem relevant, the scope of which may include but not be limited to the operation of state and local governments, their agencies and instrumentalities, which are bodies corporate and politic that the time for such committee to make its report to the legislature be, and the same hereby is, extended to and including the thirty-first day of March, 1958; and be it further

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“Resolved (if the Senate concur, That the sum of \$125,000 or so much thereof as may be necessary is hereby appropriated from the legislative contingent fund together with any unexpended balance of the fund heretofore appropriated, which is hereby reappropriated and made immediately available to pay the expenses of such committee, including personal service, in carrying out the provisions of this resolution. Such money shall be payable after audit and upon warrant of the comptroller on vouchers certified or approved by the

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chairman of the committee, or other officer or member of the committee designated by him, in the manner provided by law.

“To Rules Committee March 28. Report amended as indicated. Adopted. March 29 in Senate. To Finance Committee. March 30. Report Adopted.”

Mr. Scotti: At this time, your Honor, I 188
would like to have Resolution No. 6, adopted on January 9, 1957, making the Temporary President of the Senate, the Speaker and Majority Leader of the Assembly, the Minority Leaders of the Senate and Assembly, the chairman of the Senate finance committee and the chairman of the Assembly ways and means committee shall be members of all joint legislative committees and ex-officio members of all statutory commissions of the Legislature heretofore 189
or hereafter appointed or continued with the same standing, powers, rights and privileges as all other members of such committees and/or commissions.

Mr. Clark: This is also in People's Exhibit 3 for Identification.

The Court: Is it stipulated by the defendant and his counsel that the resolution referred to in this question is a correct copy of the original resolution adopted by the Senate and Assembly?

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Mr. Drenzo: So stipulated.

The Defendant: So stipulated.

Mr. Clark: Resolution 6 on Page 867 of the New York Legislative Index for the year 1957, marked as People's Exhibit 3 for Identification, reads as follows:

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“Resolved (if the Senate concur), That the Temporary President of the Senate, the Speaker and Majority Leader of the Assembly, the Minority Leaders of the Senate and Assembly, the chairman of the Senate finance committee and the chairman of the Assembly ways and means committee shall be members of all joint legislative committees and ex-officio members of all statutory commissions of the Legislature heretofore or hereafter appointed or continued with the same standing, powers, rights and privileges as all other members of such committees and/or commissions.

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“In the event that a vacancy shall exist on any such committee or commission, resulting from the disability of any such members, such vacancy may be filled in the manner following: if the vacancy shall result from the disability of the Temporary President or Minority Leader of the Senate, by filing with the Secretary of the Senate, a writing signed by the majority of the Senators belonging to the party in which the vacancy has occurred, designating a

successor; if the vacancy shall result from the disability of the Speaker of the Assembly, or of the Minority Leader of the Assembly, by filing with the Clerk of the Assembly a writing signed by the majority of the members of the Assembly belonging to the party in which the vacancy has occurred, designating a successor, or if the vacancy shall result from the disability of the Majority Leader, the vacancy shall be filled by the Speaker of the Assembly.

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“Adopted in both houses.”

By Mr. Scotti (resuming direct examination):

Q. Now, Mr. Bauman, did the Joint Legislative Committee convene on June 19, 1957? A. It did.

Q. And where did it convene? A. At the Association of the Bar, 42 West 44th Street, in the City and County of New York.

Q. And did one Harry Lanza, the defendant in this case, appear as a witness? A. He did. 195

Q. Was he sworn? A. He was.

Q. Do you recall who administered the oath to him? A. My recollection is the Chairman administered the oath to him, Assemblyman William F. Horan of Tuckahoe.

Q. Now, Mr. Bauman, will you please tell the Court what specific investigation the Joint Legislative was conducting at the time the defendant Harry Lanza appeared before its committee as a witness? A. I must answer in this way: On

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February 5th, 1957, one Joseph Lanza, a brother of this defendant, was arrested on a warrant issued out of the Division of Parole of the State of New York. Between February 5th and February the 19th, my recollection is, between four and five parole officers in the Division of Parole conducted an intensive investigation as to Joseph Lanza on the subject of whether or not he had been in violation of his parole. After the conclusion of that resolution, Agent Clark, Parole Officer Clark—

197 The Court: You said “resolution”—
“investigation”?

Q. “Investigation”, you mean? A. Investigation—Parole Officer Clark signed a report, which was concurred in by himself and his three associates.

The Court: Of the State Parole Division?

198 The Witness: Of the State Division of Parole.

Q. Do you recall the date of that report? Was it February 19th? A. I know it was completed on the 19th—

Q. Of 1957? A. —and I know, too, within the matter of minutes after that report was submitted to Commissioner James Stone he overruled the recommendations not only of Mr. Clark but of the three parole officers who worked with Mr. Clark on the report, all of whom felt that Mr. Joseph

Lanza was not a fit subject for restoration to parole—

Q. Was that the conclusion arrived at in this report submitted by Parole Officer Clark? A. Yes; my recollection of the last paragraph is that he used the language that Joseph Lanza was not a fit subject for restoration to parole. This was concurred in by three other parole officers who conducted the investigation with him. It was reviewed by Senior Parole Officer Israel Greenspan—

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Q. Greenstein? A. No, Greenspan—it was then reviewed by a man named Pincus, who was next in the chain of command. Mr. Pincus felt that the investigation should be continued but at the very least Joseph Lanza should be declared delinquent and held in prison until the investigation had been completed. The report then went to Mr. Dwyer, who was Mr. Pincus' superior.

The Court: Who is Mr. Dwyer?

The Witness: I beg your pardon—Mr. Doud was at that time acting as Assistant Regional Supervisor in the area of the Division of Parole, and Mr. Doud concurred in the recommendation of Mr. Clark and disagreed with Mr. Pincus in that Mr. Doud felt that Joseph Lanza was not a fit subject for parole. The report was thereupon taken in to Commissioner Stone and, as I've said before, Commissioner Stone within a matter of a very few minutes, overruled the recommendation of

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these three people, not one of whom felt that Joseph Lanza was at that moment a fit subject for restoration on parole.

Mr. Direnzo: I object and move that the answer be stricken unless the witness states of his personal knowledge.

Q. Was that conclusion reflected in the report?

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A. The report was not submitted but I heard every bit of the testimony that the committee heard and, indeed, I conducted the examination, as Mr. Direnzo knows.

Mr. Direnzo: Except this: it is still a conclusion reached by Mr. Bauman after hearing these other witnesses testify. It does not necessarily reflect the facts as they exist. I still maintain that it is his conclusion. Unless he was personally present when the report was rendered and when these transactions took place, the question is objectionable.

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The Court: How has the report been rendered? You talked of a supervisor who was his superior in the Parole Division?

The Witness: That report was completed and was introduced into evidence at the public hearings held by the legislative committee.

The Court: Do we have it?

Mr. Scotti: We haven't got it here, your Honor, but this is really on the question of materiality. We are not going into the question of whether this man was a fit sub-

ject for parole or not. I think it is collateral to this proceeding. This is testimony being elicited from Mr. Bauman only for the purpose of establishing the materiality of questions put to the defendant Harry Lanza, and not necessarily for the purpose of establishing the truth of the statements that have been made by Mr. Bauman or the truth of the report submitted by the parole officers. On the question of materiality I don't think it is germane to go into the matter as to whether the report was substantiated or not.

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Mr. Drenzo: If your Honor pleases, since Mr. Bauman was talking about these various reports which were submitted by parole officers and various supervisors and passed upon by superiors, and certain statements and suggestions were allegedly made concerning the parole involved in the case of Joseph Lanza, I submit that the best evidence is the parole report or parole jacket. For that reason, if your Honor pleases, I press the objection and ask that the original parole record be submitted to your Honor.

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By the Court:

Q. Is the jacket or file of the Parole Division concerning this particular transaction respecting Joseph Lanza in the hands of the legislative committee, Mr. Bauman? A. Not at this time; my

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understanding is that it has been returned to the New York State Division of Parole.

The Court: I would like to have it deemed marked in evidence, if there is no objection, and get a copy of it for this record here.

Mr. Scotti: May I ask one question, please?

The Court: Yes.

209 *By Mr. Scotti:*

Q. (Addressing counsel) Mr. Direnzo, have you seen this report?

Mr. Direnzo: I never have.

Mr. Scotti: Was it produced at the hearing?

Mr. Direnzo: I never saw it. I know that—

210 Mr. Scotti: Frankly, I don't see the relevancy or the materiality of it. I think Mr. Direnzo appreciates the issue involved in this proceeding.

Mr. Direnzo: I do.

Mr. Scotti: And I don't care to clutter the record with collateral matters, but if he insists and if your Honor as the presiding judge of both the issue of fact and law in this case insists upon the production of it, we will produce it. There may be confidential matter contained in that report, I don't know.

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*The Witness: I am glad you mentioned that. I waited for you to finish. I wanted to correct one statement that I made and that is I said that the report was offered in evidence. The report was—

By the Court:

Q. You mean before— A. Before the Joint Legislative Committee on Government Operations. I offered it in evidence, as a matter of fact, as I remember it, and before that was done at the request and with the concurrence of the committee I caused to be deleted from that report any names or any possible—any references in the report from which sources of information might have been gleaned. So only so much of the report went into evidence before the Joint Legislative Committee as would not divulge the sources of information. 212

Q. In other words, if anybody purportedly told a parole officer something upon which he based his conclusion, the name of that person was deleted from the report so as not to publicize it? A. The name or any other references from which his identity might conceivably have been established. 213

Mr. Drenzo: When I make this objection, if your Honor pleases, I am willing to accept that evidence with those deletions.

The Court: That's what I think should be done because that is the practice of the Parole Commission not to divulge any sources of information from which people

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may get knowledge with respect to a parolee or a parole violator.

By Mr. Scotti:

Q. I take it, then, with these deletions which you have testified to, the report was put in evidence before the joint committee? A. It definitely was.

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Mr. Scotti: Mr. Dierenzo, is there any objection to this or do you recall that as being the fact?

Mr. Dierenzo: If Mr. Bauman says it, it is so.

Mr. Scotti: Do you have any objection?

Mr. Dierenzo: No, I have no objection.

Mr. Scotti: Then you withdraw your request to have the original report submitted?

Mr. Dierenzo: I do not withdraw my request. If Mr. Bauman says it was there and I know that the record was before the Joint Legislative Committee, I am satisfied it was there, but I desire to see it. I don't withdraw the objection.

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The Court: Mr. Scotti, we have been talking about something which is not here. The best evidence would be the original report.

Mr. Scotti: We will produce it.

The Court: And I would like to have it in the record of this trial.

The Witness: It is possible, your Honor, if it may be of assistance to the Court, that

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there still may be a copy, an exact copy of the report in the form—and by “the report”, I am talking about the report of the parole officers signed by Mr. Clark and approved by Mr. Greenspan—may be in the possession of the committee staff in identical form to the one which was offered in evidence at the hearings or, indeed, we may still have the one which was offered in evidence at the hearing and I will be happy to—

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The Court: I don't want to interfere with the work of a Joint Legislative Committee by taking any exhibits from their files. I would prefer to have them deemed marked in evidence and substitute therefor in evidence here a copy, if counsel—

Mr. Drenzo: If it is a true copy, I have no objection to it. If Mr. Bauman says it is, I have implicit faith in him.

Q. Do you know when you can produce that copy, Mr. Bauman? Have you any idea? A. No. I notice one of the staff investigators is here and I am going to ask him to determine whether there is an identical copy of that report, one which is identical to the one introduced at that public hearing. I should think this afternoon—he is over there. Would your Honor permit me to talk with him for a moment?

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The Court: Yes.

(The witness confers with his assistant, off the record.)

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The Witness: Shall we go over now to see if we can get it?

Mr. Scotti: Your Honor, may I have Mr. Bauman excused for a few moments because Mr. Zuck, the stenographer who reported the interrogation of Mr. Lanza, is here in court. I understand that he is working as a free lance stenographer and must get back in about a half hour or so. Mr. Zuck.

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The Court: Very well, we will interrupt the examination of Mr. Bauman to put Mr. Zuck on the stand.

LEON ZUCK, of 154 Nassau Street, New York, N. Y., called as a witness on behalf of The People, being first duly sworn, testified as follows:

Direct Examination by Mr. Scotti:

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Q. Now, Mr. Zuck, will you be good enough to tell the Court what your profession is? A. I am a court stenographer, free lance.

Q. How long have you been a court stenographer?

Mr. Direnzo: I will concede his qualifications, Mr. Scotti.

Q. Well, how long have you been, anyway? A. I have been operating a stenotype machine for 14 years.

Q. Have you rendered services to the—I withdraw the question. Were you employed by the Joint Legislative Committee to furnish stenographic services? A. I was.

The Court: The Joint Legislative Committee on what?

Q. On Government Operations? A. That is correct.

Q. And do you recall how long a time you had been so employed? A. For the duration of the public hearings in New York City. 224

Q. Specifically, were you employed on June 19, 1957, by the Joint Legislative Committee on Government Operations? A. (Consulting record) Yes, I was.

Q. And did you act as a stenographer at the hearing that took place at the Bar Association Building in New York County on June 19, 1957? A. I did.

Q. And were you acting as such when an individual by the name of Harry Lanza, this defendant here in court, appeared before this committee as a witness on June 19, 1957? A. I was. 225

Q. Do you recall if he was sworn by the Chairman of the committee? A. I do recall.

The Court: What do you recall?

The Witness: I recall that he was sworn by Mr. Horan.

Q. Did you then proceed to take stenographic notes of questions and statements put to this particular witness? A. I did.

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Q. By chief counsel Bauman and other members of the committee? A. That is correct.

Q. And did you also take stenographic notes of replies made by the witness Harry Lanza in response to these questions put to him? A. I did.

Q. And, I take it, you also took stenographic notes of statements made by his counsel, Mr. Direnzo, who is now here in court? A. That is correct, I did.

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Q. In other words, you took the stenographic notes of the entire proceeding that took place on June 19, 1957, before this committee with respect to the witness Harry Lanza,— A. I did.

Q. —who is now a defendant in this court? A. That is correct, I did.

Q. Now, I show you People's Exhibit 4 for Identification—

The Court: Mark it.

(A typewritten transcript is marked People's Exhibit 4 for Identification.)

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Q. Is that a correct transcript of the questions and statements put to the defendant Harry Lanza by Mr. Bauman and other members of the committee on June 19, 1957, and the replies made by the defendant Harry Lanza, as well as statements made by his counsel, Mr. Direnzo? A. (Inspecting same) It is correct with one exception here.

Q. Yes? A. And this exception was called to my attention recently. One of the members of the committee, Senator Greenberg, is not listed in the transcript as voting in the affirmative.

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The Court: On what page?

The Witness: On Page 1872, where they voted to extend immunity to the defendant in this case.

A. (Continued) I have my notes with me and I have checked my notes and my notes do reflect that Senator Greenberg voted in the affirmative. It is merely an omission by the typist. It was an immediate copy job and the typist neglected to type in Senator Greenberg's affirmative vote.

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Mr. Drenzo: If your Honor please, I don't think this is necessary since we have already covered it by adequate stipulation.

Mr. Scotti: We haven't got a jury here, Mr. Drenzo. It's all right.

A. (Continued) With that exception it is a true and correct transcript.

Mr. Scotti: Had I had intelligence of this, there would be no need for me to enter into the stipulation a little while ago. I offer this exhibit in evidence, your Honor.

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By the Court:

Q. Do you have with you your original notes which you say reflect that Senator Greenberg did vote in the affirmative for that resolution? A. Yes, I have the notes and they are in my hand.

Q. Will you read from them that portion which

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has to do with that particular vote? A. (The witness refers to stenotype notes.)

The Court: The notes will be deemed marked People's Exhibit 5 for Identification.

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Q. You are now referring, I take it, to the actual stenotype tape on which you personally recorded what was said at that hearing in the Bar Association? A. Yes, sir.

Q. Very well. A. Do you wish me to read the vote of the entire committee or Senator Greenberg?

Q. Of Senator Greenberg. A. (Reading) "By Senator Greenberg, Aye."

Q. What was the resolution? Will you enter in this record the whole resolution and the whole vote?

Mr. Drenzo: No objection.

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Q. From your original notes. A. (Reading) "On the instant occasion you have again indicated that you object to testifying on the same ground—"

Q. Who is this? A. This is the Chairman, Mr. Horan, speaking. Quote: "Now, Mr. Lanza, on a prior appearance before this committee you objected to testifying on the ground that your testimony might tend to incriminate you. On the instant occasion you have again indicated that you object to testifying on the same ground, that to testify may incriminate you. On the occasion

of your prior appearance the committee believed, and still believes, that your testimony is material and necessary to its inquiry. Now, in view of your objection on that particular ground I now, as Chairman, submit the matter to this committee for such action as they may deem appropriate."

Then "By Mr. Corso: Mr. Chairman, I move, despite the objections of the witness, that he be not excused from testifying and that the witness be ordered to testify, and that if the witness complies with the order to testify he be granted immunity, as authorized by Sections 2447, 381 and 584 of the Penal Law of the State of New York, so that he shall not be prosecuted or subjected to any penalty or forfeiture or on account of any transaction, matter or thing concerning which he might answer or produce evidence, and that no such answer given or evidence produced by him shall be received against him upon any criminal proceedings."

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Then "By the Chairman: Is that motion seconded?"

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"By Senator Greenberg: I second the motion.

"By the Chairman: The motion made by Assemblyman Corso, seconded by Senator Greenberg."

Then "By Mr. Direnzo: Just for the sake of the record, will the record indicate that the membership of the committee and the attendance of the committee at this time is exactly the same as it was with reference to the witness Giordano, so that I can note his objections for the same purpose?"

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"By the Chairman: The record will so indicate and will indicate that there has been no change in the presence of the members of the committee since this committee reconvened after lunch."

Still by the Chairman: "Mr. Secretary, will you call the roll."

Now we have the actual voting.

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Q. Read it into the record. A. "Senator Zaretsky, Aye. Senator Greenberg, Aye. Senator McGahan, Aye. Assemblyman Carlino, Aye. Assemblyman Bannigan, Aye. Chairman Horan, Aye. Senator Corso, Aye—"

Mr. Direnzo: Not "Senator" Corso—Assemblyman.

The Witness: I didn't write their titles, just their names.

The Court: He will appreciate the elevation but we want the record to be correct.

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A. (Continued) "The Chairman: The motion is carried by a majority of the committee, of the full committee. Mr. Lanza, do you understand the effect of this motion is to grant you immunity so far as any testimony that you may give before this committee?"

"By Mr. Direnzo: The witness at this time would like to make one brief statement.

"By Mr. Lanza: As far as I understand, I have limited immunity?"

"By the Chairman: Mr. Lanza, let me advise you, as I did the previous witness, that the immunity provided for by the statutes which may be

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granted by this committee when pursuing the investigations that I have referred to previously in this statement, is not a limited immunity."

Then by Mr. Bauman, counsel for the committee: "Read the first question, please," and then I proceeded to read the questions to the witness, and shall I continue reading?

Mr. Scotti: I expect all of this to be read by Mr. Bauman into the record after it is put into evidence.

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The Court: I beg your pardon?

Mr. Scotti: I expect all of this to be read into the record by Mr. Bauman.

The Court: Then you want to insert into the contents of this record just what the actual vote was, as there was allegedly some failure of the typist to record the vote in the exhibit which you offer?

Mr. Scotti: That's the reason why we offered that stipulation. Had I heard of this before, I wouldn't have entered into it.

243

The Court: I would prefer to have the record speak for itself.

Mr. Direnzo: I have no objection.

The Court: Then People's Exhibit 4 for Identification is received in evidence.

(The transcript of minutes of the hearing of June 19, 1957, is marked People's Exhibit 4 in Evidence.)

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*Leon Zuck—for People—Cross**Cross Examination by Mr. Direnzo:*

Q. Mr. Zuck, did you have occasion to take stenographic notes involving the witness Harry Lanza in any other proceeding save and except June 19, 1957? A. Yes.

Q. Can you tell me what dates you took these stenographic minutes of his testimony? A. I am afraid I can't recall offhand. I took the entire set of public hearings.

245

The Court: Within the City of New York?

The Witness: Yes, sir, at the Bar Association.

Q. Right. Now, do you have your transcript of testimony of the witness Harry Lanza prior to the June 19, 1957, hearing at the Bar Association Building? A. Are you referring to the actual transcript itself?

246

Q. Either the transcript or your original stenographic notes?

The Court: His stenographic tape.

Mr. Direnzo: The tape.

The Court: It is the tape on which the stenographic symbols are made by the stenotype machine.

A. They are not in my possession. They are in the possession of Herbert B. Sansom, court reporter at 154 Nassau Street.

Q. Can you get those records? A. I don't know whether they would be made available to me.

Leon Zuck—for People—Cross

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Mr. Direnzo: If your Honor please, at this time I ask your Honor to direct this witness to produce the stenographic notes with reference to the proceeding prior to January 19—June 19, 1957, wherein Harry Lanza was called as a witness before the Joint Committee.

The Court: Do you have in mind other dates?

Mr. Direnzo: It's another date.

Mr. Scotti: May I make a suggestion that might be helpful in ruling on that?

248

The Court: Yes.

Mr. Scotti: May I suggest respectfully that Mr. Direnzo defer this request until Mr. Bauman resumes his testimony on the stand?

The Court: Well, the request may stand. I shall direct compliance with it with the reservation that that direction may be—

Mr. Scotti: Renewed?

The Court: —changed, and the request may be withdrawn if Mr. Direnzo sees fit to withdraw it when Mr. Bauman is through. So you need not produce that immediately until you hear further, Mr. Witness, from the District Attorney.

249

Mr. Scotti: On Page 1883 of the transcript—

The Court: Which is—

Mr. Scotti: The testimony taken June 19, 1957.

The Court: That is 4 in evidence?

250

Leon Zuck—for People—Cross

Mr. Dorenzo: Four in evidence.

The Witness: What page?

Mr. Scotti: 1883. Perhaps if we showed him the page it might be easier to locate it.

Mr. Dorenzo: Yes.

Mr. Scotti: Does this help you (showing witness Exhibit 4)?

The Witness: I don't know what his question is to go ahead.

251

Q. (By Mr. Dorenzo) The statement on that page commencing with the words "Mr. Chairman" after the name "Assemblyman Corso"—do you follow it? A. I do.

252

Q. Will you read that aloud. A. (Reading from People's Exhibit 4 in evidence) Quote "Mr. Chairman, the witness having refused to testify before this Joint Legislative Committee on Government Operations, as directed and ordered, I move that this matter be referred to the District Attorney of New York County for appropriate action by him and that the record of minutes of these proceedings be delivered to the District Attorney of New York County."

Q. Does that statement represent an accurate transcript from your notes? A. I have it right here (referring to original stenotype notes, Exhibit 5 for identification). I will read from my stenotype notes.

Q. Will you do that, please. A. I am now reading from my stenotype notes: "Mr. Chairman, the witness having refused to testify before this Joint Legislative Committee on Government Operations, as directed and ordered, I move that this

matter be referred to the District Attorney of New York County for appropriate action by him and that the record of minutes of these proceedings be delivered to the District Attorney of New York County."

Q. Is that an accurate—are those the notes of the testimony or the statement that you took at that hearing on June 19, 1957? A. These are those notes.

Q. And it is accurate? A. Yes, sir.

Q. Now will you be good enough to read your original notes right beyond that point with reference to the motion and the vote taken by the committee? Do you follow me, Mr. Zuck?

254

Mr. Scotti: Continue reading.

Q. Continue reading "Mr. Chairman".

Mr. Scotti: "The Chairman."

A. The next thing my stenotype notes reflect is: "The Chairman: The motion by Mr. Corso, do I hear a second?"

255

Q. Will you keep reading until I stop you, please? A. (Continuing to read) "By Senator Greenberg: Seconded.

"By the Chairman: Seconded by Senator Greenberg. Any discussions?"

"Paren (parenthesis)—no response.

"By the Chairman: The Secretary will call the roll on this motion."

Then "By Senator Zaretsky, Aye. Senator Greenberg, Aye. Senator McGahan, Aye. Mr.

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Leon Zuck—for People—Cross

Carlino, Aye. Mr. Bannigan, Aye. Mr. Horan, Aye. Mr. Corso, Aye."

Then "By the Chairman: The motion is unanimously carried.

"By Mr. Drenzo: I take it that this also is under 1330 of the Penal Law?"

257

Q. Go ahead. A. (Continuing to read) "By the Chairman: All afternoon, Mr. Drenzo, you have been asking me to interpret the law and give you sections and all of that and I am sure you don't need my advice on what—

"(Interposing) By Mr. Drenzo: I think it is important here because that's the observation I think I heard Senator Zaretsky make at the termination of testimony—

"(Interposing) By the Chairman: Any observation by Senator Zaretsky is not only important but needs no further explanation.

"By Mr. Drenzo: I take it is on the same basis, is that correct?"

258

Q. All right, you can stop there. That portion of the transcript when you have just read from your original notes, is that an accurate transcript?

A. To the best of my knowledge, it is.

Q. Now, Mr. Zuck, you testified before the Grand Jury in this case, did you not? A. I did.

Q. Can you tell me when you appeared before the Grand Jury?

Mr. Drenzo: You can give me the date, Mr. Scotti, and relieve the witness.

Mr. Scotti: He appeared on June 25th, 1957.

Q. That was on June 25th, 1957, is that correct?

A. That is correct.

Q. Now, will you tell me, Mr. Zuck, whether you testified before the Grand Jury? A. I did testify before the Grand Jury.

Q. And when you testified before the Grand Jury did you read to the Grand Jury specific questions and the answers which were given to those specific questions or did you in effect—or did you submit the transcript in evidence to the Grand Jury and certify that it represented a correct transcript of the proceedings before the Joint Committee on June 19, 1957? A. I recall that I did not read any specific questions and answers to the Grand Jury. I think that the District Attorney submitted a transcript to me and upon perusal I identified it as the transcript which was typed from my notes and that it was correct. 260

Mr. Drenzo: Thank you, Mr. Zuck.

Mr. Scotti: Thank you, sir.

The Court (to the witness): You keep 261 those (referring to original stenotype notes, People's Exhibit 5 for Identification), so that they will be available if ever required and preserve them.

The Witness: Yes, I will.

(The witness is excused.)

Mr. Scotti: Arnold Bauman, recalled.

Mr. Drenzo: Are we going to have a luncheon recess, your Honor.

262 *Arnold Bauman—for People—Continued Direct*

The Court: How long will Mr. Bauman be?

Mr. Scotti: I won't be too long with him. It all depends upon the witness. If he would like to have the recess, it is okay with me.

Mr. Drenzo: I just want to oblige the Court in every way.

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ARNOLD BAUMAN, recalled by the People, testified further, as follows:

Mr. Scotti: What was that last question?

The Witness: I believe you asked me what it was we were to investigate.

The Court: Read the last question put to Mr. Bauman.

264

(The stenographer read the record of the previous question, as follows: "Now, Mr. Bauman, will you please tell the Court what specific investigation the Joint Legislative Committee was conducting at the time the defendant Harry Lanza appeared before its committee as a witness").

The Witness: Now, in addition to the matter that previously had mentioned at the time the committee went into this investigation, and that was that the defendant Harry Lanza testified to or had fur-

ther information of a very specific sort that justified it—I withdraw and—information of a specific sort that led it to believe that Mr. Lanza's—

Mr. Direnzo: That's objected to, if your Honor pleases, and I move that the answer be stricken.

The Court: No, I will allow it.

Mr. Scotti: On the question of materiality, your Honor.

The Court: I will allow it.

Mr. Direnzo: I except.

A. (continued) —that led us to believe that in the case of Joseph Lanza's restoration to parole there might have been bribery, official corruption or a conspiracy, and it was that that the committee was investigating, namely, whether or not any public official had been bribed, whether Mr. Lanza's restoration to parole had come about as the result of such bribery and/or as the result of official corruption as a result of a conspiracy. It was that that the committee was investigating at the time that Harry Lanza, the defendant in this case, was interrogated at the public hearing.

By Mr. Scotti:

Q. In other words, if I may recapitulate, at the time Harry Lanza appeared as a witness before the Joint Legislative Committee on June 19, 1957, there was in progress an investigation to determine—

The Court: By the—

Q. (continued) —by the said committee, to determine whether there had been in existence a conspiracy to influence unlawfully and corruptly anyone connected with the Parole Commission of the State of New York, is that correct? A. That is correct.

Q. And it was the further purpose of said investigation to determine whether or not there was a conspiracy to pervert the due administration of the laws, is that correct? A. That's right.

Q. And also, as you brought out, there was an investigation to determine whether there was in existence a conspiracy to commit the crime of bribery of a public official? A. Yes.

The Court: Well, to be more specific can you pinpoint the division in which you refer to somebody as being a public official? Is that all in the Division of Parole of the State of New York?

Q. When I say "public officers", I believe I am reflecting the thinking of the committee in the sense that they were trying to determine whether any public officers connected with the Parole Division of the State of New York had been bribed. Am I correct, sir? A. Your Honor, I think I must say that at the time the committee was investigating into this area it was, of course, investigating to determine whether any official of the Division of Parole has been bribed in connection with the restoration to parole of Joseph Lanza, and had received confidential information which justified such—

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Mr. Direnzo: That's objected to, if your Honor please. I move that the answer be stricken.

The Court: Strike out the statement whether they were justified or not.

The Witness: I withdraw that.

The Court: You may withdraw it.

Q. May I—

The Court: You may proceed.

272

A. I just wanted to say one other thing. However, sir, the committee was not limiting its investigation to just people in the New York State Division of Parole. It was interested, although its basic inquiry was into the Division of Parole, in any other public official of the State of New York who might have acted wrongfully or corruptly.

The Court: But in connection with this same alleged investigation with respect to the Lanza case, is that correct?

273

The Witness: Yes, sir, that's absolutely right.

Q. In other words, the committee, I take it, was seeking to determine what brought about the release of Joseph Lanza on parole and whether that was prompted by acts which were violative of the Penal Law, namely, a conspiracy, the law concerning bribery of a public official, am I correct? A. That's right.

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Q. Was the witness Harry Lanza represented on June 19— A. May I see those minutes? I am not sure if the date is correct.

Q. —1957, by Mr. Direnzo, who is now in court?

275

A. He was but if there is something from which I could refresh my recollection as to the date on which this defendant Harry Lanza appeared before the Joint Legislative Committee on Government Operations—what I am saying is, your Honor, I am not certain of June 19th as the date on which he appeared before the committee.

Q. At any rate, if the record so states you would have no reason to believe that that is not the date? A. No, certainly not. I just don't have any independent recollection.

Q. But you do know he appeared for questioning and was interrogated? A. I do know.

276

Q. At the Bar Association Building in the County of New York, is that correct? A. I have a small problem, Mr. Scotti, with the month of June. I am not sure whether it was May or June in which Mr. Lanza appeared at the Bar Association. I know he was there and I know that Mr. Direnzo, of course, was with him and that I interrogated him, there is no doubt about that.

Mr. Direnzo: There is no doubt about that.

By the Court:

Q. Did he appear on more than one occasion?

A. He did, sir, yes.

Q. During that particular period of May or

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(People's Exhibit 4 Read into Record)

June? A. During that same set of public hearings; they were continuous. There was one set of public hearings with relation to this Lanza matter, but there may have been a recess of a day or two, but basically we regarded it as a set of public hearings, and Mr. Direnzo did, too, and he appeared on more than one occasion.

Q. Within the months of May and June of 1957? A. Yes, sir.

278

By Mr. Scotti:

Q. Directing your attention to his appearance as of June 19, 1957, as reflected in People's Exhibit 4 in evidence, will you be good enough, Mr. Bauman, to state to the Court the questions put to this witness on that occasion, either by you or by members of the Joint Legislative Committee of the State of New York on Government Operations and responses made by the witness, as well as statements made by his attorney, Mr. Direnzo.

279

A. Did you say Exhibit 4?

Q. Yes. A. (Reading from People's Exhibit 4 in evidence) "Harry Lanza, having been duly sworn, testified as follows. I asked—may it appear—"

Mr. Direnzo: What page are we starting with, Mr. Bauman?

The Witness: Page 1852 of the minutes of the proceeding before the Joint Legislative Committee on Governmental Operations. May it appear, sir, that unless I

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Arnold Bauman—for People—Direct
(People's Exhibit 4 Read into Record)

otherwise indicate, I asked the questions, the defendant Harry Lanza answered me, as I say, unless I otherwise indicate?

Q. May I suggest that you read as it is reflected in the record? A. (Continuing to read from Exhibit 4)

281

"By Mr. Bauman:

Q. State your name, please, for the record.
 A. Harry Lanza.

Mr. Bauman: Mr. Direnzo, will you state your name and office address for the record?

Mr. Direnzo: Michael P. Direnzo, 253 Broadway, New York City.

Mr. Bauman: You appear as counsel for the witness Harry Lanza, is that correct?

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Mr. Direnzo: I do.

The Chairman: You do and have?

Mr. Direnzo: I do and have.

Q. Mr. Lanza, you are the brother of Joseph Lanza, is that correct? A. That's right.

Q. Mr. Lanza, during the month of February, 1957—withdrawn. On February 5, 1957, your brother Joseph Lanza was arrested and returned to prison charged with a violation of his parole. Tell the committee, please, any and all efforts

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(People's Exhibit 4 Read into Record)

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extended by you to assist in obtaining the release of your brother Joseph Lanza on parole or his restoration to parole.

Mr. Drenzo: At this time, if it pleases the committee, I object to any questions being propounded to this witness on the ground that on his appearance before this committee, and which he gave testimony, this committee voted that he be held in contempt, and I think under the circumstances, since his conduct has been deemed contumacious by this committee, I don't think under the circumstances you can propound questions to him at this time. 284

The Chairman: Is that the scope of your objection, sir?

Mr. Drenzo: That's the present scope of the objection at this time.

The Chairman: The full scope?

Mr. Drenzo: That's right. 285

The Chairman: At this time?

Mr. Drenzo: That's right.

The Chairman: Unless there is some discussion among—"

Mr. Drenzo: "Some dissention."

The Witness: "Some dissention", thank you.

A. (Continuing to read)—"among the committee, you will be overruled. You say because this committee passed a motion to take proceedings, con-

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 (People's Exhibit 4 Read into Record)

tempt proceedings against this witness, therefore, he may not, or he may avail himself of some privilege based upon that?

Mr. Direnzo: That's correct.

The Chairman: In refusing to answer questions?

287 Mr. Direnzo: That's correct. He stands at least as a respondent in a contempt proceeding if I understood the conduct of this committee properly—"

Mr. Direnzo (interrupting): "If I understood?"

The Witness: "If I understood the conduct of this committee properly."

A. (continuing to read) "The Chairman: Is it your contention that proceedings have been taken?

288 Mr. Direnzo: Apparently they are initiated and apparently he is on the target in a contempt proceeding by this committee.

The Chairman: Has he been served with any papers in connection with the contempt proceeding?

Mr. Direnzo: He has not been served with any formal document or any mandate, but I state he has been apprised of it by a unanimous vote of this committee in this very room.

The Chairman: Unless there is some

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(People's Exhibit 4 Read into Record)

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dissent among the members of the committee, your objection will be overruled.

Q. Will you answer the question, please, Mr. Lanza? A. I refuse to answer.

Q. On what grounds? A. On the ground it may tend to incriminate me.

Mr. Drenzo: So the record will be clear, in the instance where the witness refuses to answer, we will take it he means to refuse to answer on the ground the answer may tend to incriminate him unless some other specific ground is given, just to save time, Mr. Chairman.

290

The Chairman: That's agreeable.

The committee directs you to answer:

The Witness: I refuse.

Q. Did you have a conversation with your brother Joseph Lanza on February 13, 1957, at the Westchester County Jail? A. I refuse to answer.

291

The Chairman: The committee directs you to answer.

The Witness: I refuse to answer.

Q. Did you on that occasion tell your brother Joseph Lanza what you had done and what you were doing in connection with attempting to obtain his restoration to parole? A. I refuse to answer.

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(People's Exhibit 4 Read into Record)

The Chairman: The committee directs you to answer.

The Witness: I refuse.

Q. Did you on that occasion tell your brother, "Because they wanted to speed up the thing, you know, and wanted to get a chance—"

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The Court: Will you please read the commas and punctuation in this particular instance.

The Witness: I will reread the question then, sir.

A. (continuing to read) Did you on that occasion tell your brother, "Because they wanted to speed up the thing, you know, and wanted to get a chance," and did your brother on that occasion answer, "Yes, that's right, it's all right. Working good. You know what I mean?" A. I refuse

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to answer.

The Chairman: On the same ground?

The Witness: I refuse.

The Chairman: The committee directs you to answer.

The Witness: I refuse.

Q. When you said, "They wanted to speed the thing up—" withdrawn.

When you said, "They wanted to speed up the thing," were you talking about speeding up the

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(People's Exhibit 4 Read into Record)

disposition of the violation of parole charge then existing against your brother Joseph Lanza? A. I refuse to answer.

The Chairman: The committee directs you to answer.

The Witness: I refuse.

Q. Did you tell your brother Joseph Lanza that Mr. Dwyer of the New York State Division of Parole was responsible for the charge that was being made against your brother Joseph Lanza? 296
 A. I refuse to answer.

The Chairman: The committee directs you to answer.

The Witness: I refuse.

Q. In other words, did you say to him, "Doud"—(spelling) d-o-u-d—

The Court: Capital "D"—o-u-d! 297

The Witness: Yes.

A. (continuing to read)—"Doud, eh, Doud nothing, it's Dwyer that's everything"? A. I refuse.

The Chairman: The committee directs you to answer.

The Witness: I refuse.

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Arnold Bauman—for People—Direct :
(People's Exhibit 4 Read into Record)

Q. How did you know, Mr. Lanza, that Mr. Dwyer was responsible for the bringing of these charges against your brother Joseph Lanza? A. I refuse to answer.

The Chairman: The committee directs you to answer.

The Witness: I refuse.

299

Q. On that same occasion, did you tell your brother in Italian, "They wanted to know whether one of the big ones came, understand?" And did your brother reply to you, and by your brother I mean Joseph Lanza, "Well, did you see him? He is sitting this week."

Did that conversation take place? A. I refuse.

The Chairman: The committee directs you to answer.

The Witness: I refuse.

300

The Chairman: The committee directs you to answer.

The Witness: I refuse.

Q. When you used the expression, "They wanted to know whether one of the big ones came," were you talking about one of the Commissioners of Parole of the State of New York? A. I refuse to answer.

The Chairman: The committee directs you to answer.

The Witness: I refuse.

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(People's Exhibit & Read into Record)

Q. When your brother said, when your brother Joseph Lanza said, "Well, did you see him? He is sitting this week."

Did you understand him to mean that the person that was sitting this week was a Commissioner of Parole of the State of New York? A. I refuse to answer.

The Chairman: On the same ground? 302

The Witness: I refuse.

The Chairman: The committee directs you to answer.

The Witness: I refuse.

Q. Did you then tell your brother Joseph Lanza, "Him, no? He is sitting. And they were trying to speed it up, understand, for this week, but he is no good." A. I refuse.

The Chairman: The committee directs you to answer. 303

The Witness: I refuse.

Q. Were you talking about any officer or employee of the Division of Parole of the State of New York? A. I refuse to answer.

The Chairman: The committee directs you to answer.

The Witness: I refuse.

Q. In the portion of your conversation just quoted, were you talking about trying to speed

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Arnold Bauman—for People—Direct
(People's Exhibit 4 Read into Record)

up the disposition of the charge of violation of parole in the case of Joseph Lanza? A. I refuse.

The Chairman: The committee directs you to answer.

The Witness: I refuse.

305

Q. Now, did you tell your brother Joseph Lanza during that conversation, "That one is no good. He is sitting this week and after this week he goes. Then comes Hirsch (spelling H-i-r-s-c-h). Then comes the other, the friend of ours." A. I refuse.

The Chairman: The committee directs you to answer.

The Witness: I refuse.

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Q. Were you talking about Commissioners of Parole of the State of New York when you stated what I have just read to you to your brother, Joseph Lanza? A. I refuse.

The Chairman: The committee directs you to answer.

The Witness: I refuse.

Q. When you said, "He is sitting this week and after this week he goes," about whom were you talking? A. I refuse to answer.

The Chairman: The committee directs you to answer.

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(People's Exhibit 4 Read into Record)

The Witness: I refuse.

Q. When you said, "Then comes Hirsch," were you talking about Commissioner Hirsch of the Division of Parole of the State of New York?

A. I refuse to answer.

The Chairman: The committee directs you to answer.

The Witness: I refuse. 308

Q. When you said, "Then comes the other, the friend of ours," about whom were you talking?

A. I refuse to answer.

The Chairman: The committee directs you to answer.

The Witness: I refuse.

Q. Was the person about whom you were talking a Commissioner of Parole of the State of New York? A. I refuse to answer. 309

The Chairman: On the same ground?

The Witness: The same ground.

The Chairman: The committee directs you to answer.

The Witness: I refuse.

Q. Did your brother Joseph Lanza then say to you, "Then we are good there, no?" And did you say to him, "Now everything, only one parrot, parrot in 3. Anything. The responsibility, you

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 (People's Exhibit 4 Read into Record)

know what I'm talking about with the little man?" And Joseph Lanza said, "Oh," and you said, "And the big man," and then there was a silence and Joseph Lanza said, "Oh, very good, very good."

Did that conversation take place? A. I refuse.

 The Chairman: The committee directs
311 you to answer.

 The Witness: I refuse.

Q. When you talked about the little man, to whom did you refer, sir? A. I refuse.

 The Chairman: The committee directs
 you to answer.

 The Witness: I refuse.

Q. And what is the name of the "big man" in the question that I have just asked you? A. I
312 refuse to answer.

 The Chairman: The committee directs
 you to answer.

 The Witness: I refuse.

Q. Were you talking about efforts extended by the "little man" and the "big man" in connection with obtaining the restoration to parole of Joseph Lanza? A. I refuse to answer.

 The Chairman: The committee directs
 you to answer.

 The Witness: I refuse.

Arnold Bauman—for People—Direct
(People's Exhibit 4 Read into Record)

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Q. During that conversation, did Joseph Lanza say to you, "Up to now they are not working," and did you say to him, "Yes, I know"? "Up to 12 o'clock last night, nothing." A. I refuse to answer.

The Chairman: The committee directs you to answer.

The Witness: I refuse.

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Q. Were you talking about people working to obtain the release of your brother Joseph Lanza from prison? A. I refuse to answer.

The Chairman: The committee directs you to answer.

The Witness: I refuse.

Q. And when you agreed with him that they weren't working up to 12 o'clock last night, about whom were you talking? A. I refuse.

315

The Chairman: The committee directs you to answer.

The Witness: I refuse.

Q. Mr. Lanza, did you say to your brother Joseph Lanza, "Only one man could do it. You are a violator. See, when you are a violator, anyone of the five commissioners sit there. They rotate every week. Once a day, and when they complete their investigation, then they make a decision, you know"?

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Arnold Bauman—for People—Direct
(People's Exhibit 4 Read into Record)

And did your brother Joseph Lanza then say,
 "One makes the decision"? And did you say,
 "That's all, one man"? A. I refuse.

The Chairman: The committee directs
 you to answer.

The Witness: I refuse.

317

Q. When you talked about the five commis-
 sioners, any one of the five commissioners sit
 there, were you talking about the five commis-
 sioners of Parole of the State of New York? A.
 I refuse.

Assemblyman Corso: The committee di-
 rects you to answer.

The Witness: I refuse.

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Q. When your brother Joseph Lanza asked you,
 "The one man makes the decision?" And you
 said, "That's all, one man," were you telling
 him that one commissioner of the Division of
 Parole of the State of New York would make the
 decision as to whether or not he, Joseph Lanza
 was to be restored to parole? A. I refuse to
 answer.

Assemblyman Corso: The committee di-
 rects you to answer.

The Witness: I refuse.

Q. Who gave you the information, Mr. Lanza,
 which you conveyed to your brother Joseph

Arnold Bauman—for People—Direct
(People's Exhibit 4 Read into Record)

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Lanza in the conversation I have just read to you? A. I refuse to answer.

The Chairman: The committee directs you to answer.

The Witness: I refuse.

Q. Mr. Lanza, during a conversation with your brother Joseph Lanza on February 13, 1957, at the Westchester County Jail, did your brother Joseph Lanza say to you, "I will tell you the truth, though, if I go back on this, they are going to put their head in a—"

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You laughed and Joseph Lanza said, "I want you to know that they are ruined."

Did Joseph Lanza say that to you? A. I refuse to answer.

The Chairman: The committee directs you to answer.

The Witness: I refuse.

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Mr. Bauman: Mr. Chairman, I have concluded my examination of this witness at this time.

The Chairman: The record, of course, will show the notice which was served upon the Attorney General and the District Attorneys of New York County and Westchester County, notifying these officials that this committee today is considering the question of the giving of immunity to this witness and other witnesses.

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(People's Exhibit 4 Read into Record)

Mr. Drenzo: May I see the notice, Mr. Chairman?"

The Witness: Then Mr. Drenzo again:

"Mr. Drenzo: May I be heard on the question of the notice, Mr. Chairman?"

The Chairman: We'd better have Mr. Bannigan in here. I'm sure you want to speak to all the members present, Mr. Drenzo.

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Mr. Drenzo: I take it that this notice is directed to the Attorney General of the State of New York, Louis J. Lefkowitz, Frank S. Hogan, District Attorney of New York County and Joseph F. Gagliardi, District Attorney of Westchester County.

I take it that no notice was sent to district attorneys of any other counties, is that correct, Mr. Chairman."

The Witness: The minutes indicate there was no response.

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A. (continuing to read) "Mr. Drenzo: Now, I take it also from a reading of the notice, that this was the notice that's required under Section 2447.

Now, I take it also that Sections—the grant of the alleged—the alleged grant of immunity here is by Sections 584 and 381 of the Penal Law within Section 2447 insofar as it refers to a positive statute or section whereby immunity can be granted, those sections which we commonly refer to as the bath sections, is that correct, Mr. Chairman?"

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The Chairman: Maybe I'd better make the statement that I made before. I think that explains the situation. And I will make it for the benefit of this witness at this time.

This committee has been investigating the facts and circumstances which lead to—"

The Witness (interrupting himself): This is spelled "l-e-a-d". My recollection is the Chairman said "which led".

326

A. (continuing to read)—"to Joseph Lanza's arrest for violation of parole on February 5, 1957 and his restoration to parole on February 19, 1957, in connection with this matter.

The committee has been and is still seeking to determine whether any persons conspired to commit acts calculated to pervert or obstruct justice or the due administration of the laws, whether any persons conspired to commit a crime, whether any person gave or offered a bribe or caused a bribe to be given or offered to a public officer.

327

Mr. Dorenzo: In effect, you are reading, are you not, a provision or a portion of Section 580 of the Conspiracy Statute—

The Chairman: (Interposing) I am reading, Mr. Dorenzo, that which I read.

Mr. Dorenzo: All right, Mr. Chairman.

Mr. Bauman: Pardon me just a minute, Mr. Dorenzo.

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The Chairman: I think the circumstances here are perfectly clear. This committee has been conducting, is conducting an inquiry into the facts and circumstances relating to the restoration to parole of Joseph Lanza.

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We are conducting an inquiry to ascertain whether or not there was any bribery or corruption or a conspiracy. That, I think, has been clear to everybody.

Mr. Drenzo: When this notice, which is received today as Exhibit 1, was received in evidence, or as a committee exhibit, I had no opportunity to object to its introduction into evidence. Right now I have it, I take it.

330

The Chairman: You attempted while we were examining another witness to urge an objection and I told you at the time that when your client, your clients were called, you would have the opportunity to urge any objections that you have to this notice.

If you want us to go through the motions of reintroducing it, we will do it.

Mr. Drenzo: For the sake of saving time, might I suggest that I repeat and reiterate with the same full force and effect all of the objections made by Mr. Arnold Roseman on behalf of the previous witness with reference to the introduction of this

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instrument, which has been received as Exhibit 1 today.

I also repeat and reiterate with the same full force and effect all objections he made relative to the purpose of the inquiry, the materiality of the questions propounded, the question of the jurisdiction of the committee, the question of the attendance of the full committee, the question of whether a majority of the committee is present here and I recognize that I will probably get the same rulings and I want to note the same objections that he did.

332

The Chairman: Unless there is some change on the part of the committee, you will get the same ruling."

The Court: May I stop you there to inquire whether I can get into this record of this trial the objections which were made by Mr. Roseman and which were adopted by Mr. Direnzo with respect to his client, and also a copy of any notices that were sent to the Attorney General and the District Attorneys and the time at which such notices were sent?

333

The Witness: I understand that the District Attorney is going to offer the original of that notice in evidence.

Mr. Scotti: Or a copy of that notice; we have that.

The Witness: Or a copy.

The Court: Showing the time?

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Mr. Scotti: The witness will testify to that, your Honor.

The Witness: Now, as to the objections taken by Mr. Roseman, they are contained in the testimony of the witness Giordano, of which the District Attorney has a copy.

Mr. Scotti: We have a copy of that testimony.

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Mr. Direnzo: I think I have it here.

The Court: Can we stipulate, Mr. Direnzo, that the copy of the testimony taken at the hearing of June 19th at the Bar Association does contain accurately the objection raised by Mr. Roseman, which you adopted as the objection on behalf of the defendant Lanza?

Mr. Direnzo: We can so stipulate and will.

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The Court: And that may be marked in evidence here as part of our record of this trial.

Mr. Direnzo: You mean the specific objections?

Mr. Scotti: Yes, I think we have it upstairs. At any rate, we will produce it.

The Court: I want to incorporate it in this record.

We will recess now until 2:45. Bail continued.

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AFTERNOON SESSION

ARNOLD BAUMAN, resumed:

The Court: Mr. Bauman, will you resume your reading of the transcript of the questions and statements put to the witness Harry Lanza and replies made by Harry Lanza, as well as the statements made by his attorney, Mr. Direnzo.

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The Witness: Yes, I had reached that point where Mr. Direnzo had specified certain objections that he had taken with respect to the jurisdiction of the Committee and various other legal matters, and the record continues:

(Reading) The Chairman: Unless there is some change on the part of the committee, you will get the same ruling.

Mr. Direnzo: Fair enough.

Senator Greenberg: What is the ruling, Mr. Chairman?

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The Chairman: You are overruled.

Senator Greenberg: May we proceed, Mr. Chairman?

Q. Mr. Lanza, please tell the committee the name of anybody with whom you spoke during the month of February 1957, about the restoration to parole of your brother Joseph Lanza? A. I refuse to answer.

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The Chairman: On the same grounds?

The Witness: The same ground.

The Chairman: And the committee directs you to answer.

The Witness: I didn't hear you.

The Chairman: The committee directs you to answer.

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The Witness: I refuse to answer on advice of counsel and also on the other ground.

Mr. Bauman: I have no further questions.

The Chairman: Well now, wait a minute. Are you now refusing to answer just on the advice of counsel or are you refusing to answer on the ground that your answer will tend to incriminate you?

The Witness: Both.

342

The Chairman: Because I have hesitated, out of regard to the dignity of the legal profession, to make this comment before, but I think all of us lawyers up here will agree that an objection on the ground of advice of counsel is not a legally tenable objection.

Mr. Drenzo: Under the circumstances, I might differ with the committee chairman.

The Chairman: It might be an explanation but it is not an objection.

Mr. Drenzo: I think under the circumstances it is absolutely necessary.

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The Chairman: You say that that is a valid objection, that he may object here, before this committee, to any question asked of him on the ground just on advice of counsel?

Mr. Direnzo: No, on the ground that there seems to be a very, very serious question here as to whether you can, this committee can, properly clothe the witness with immunity and counsel is of the firm conviction and understanding that you cannot—

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The Court: (Interrupting) “Probably” or “properly?”

The Witness: (Continuing reading) Properly clothe the witness with immunity and counsel is of the firm conviction and understanding that you cannot, and under those circumstances he has so advised his client and under the circumstances, I think the client, recognizing that he is represented by counsel, counsel feels that he doesn't have to answer those questions, only because he doesn't have a full and proper and adequate grant of immunity should state that he is doing it to show a lack of willfulness on his part.

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The Chairman: So again, that there may be no misunderstanding, in the event that further proceedings may be taken, the witness is advised that the fact that the fact that he is acting upon the advice of

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counsel will not in any way absolve him of the responsibility for answering questions put by this committee.

I would not want any witness to be laboring under any misapprehension that the advice of counsel would insure that protection for what may be a willful refusal to answer questions before this committee.

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Mr. Direnzo: May I ask the Chairman one question.

Suppose this committee is in error about the immunity? Where does the witness stand?

The Chairman: Mr. Direnzo, if you want to argue the law with me and it might be very elevating to you, but we will select another time.

Now, let's proceed.

Mr. Bauman: I have no further questions.

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The Chairman: Now, Mr. Lanza, on a prior appearance before this committee, you objected to testifying on the ground that your testimony might tend to incriminate you.

On the instant occasion you have again indicated that you object to testifying on the same ground, that to testify may incriminate you.

On the occasion of your prior appearance, the committee believed and still be-

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lieves that your testimony is material, necessary to its inquiry.

Now, in view of your objection on that particular ground, I now, as Chairman, submit the matter to this committee for such action as they may deem appropriate.

Assemblyman Corso: Mr. Chairman, I move, despite the objections of the witness, that he be not excused from testifying and that the witness be ordered to testify and that if the witness complies with the order to testify, he be granted immunity as authorized by Section 2447, 381 and 584 of the Penal Law of the State of New York, so that he shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he might answer or produce evidence and that no such answer given or evidence produced by him shall be received against him upon any criminal proceedings.

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The Chairman: Is that motion seconded?

Senator Greenberg: I second the motion.

The Chairman: The motion made by Assemblyman Corso, seconded by Senator Greenberg.

Mr. Drenzo: Just for the sake of the record, will the record indicate that the membership of the committee and the at-

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tendance of the committee at this time is exactly the same as it was with reference to the witness Georgiano, so that I can note his objections for the same purpose.

The Chairman: The record will so indicate. And will indicate there has been no change in the presence of the members of the committee since this committee reconvened after lunch.

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Mr. Secretary, will you call the role.

Assemblyman Corso: Senator Zaretzki.

Senator Zaretzki: Aye.

Assemblyman Corso: Senator McGahan.

(Stops reading).

Mr. Dierenzo: (Interrupting) Excuse me. At this time, if your Honor please, I believe that's where we made the stipulation including Senator Greenberg, so that we can keep the record absolutely straight.

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Mr. Scotti: Right.

The Witness: (Continuing reading)
 Senator McGahan: Aye.

Assemblyman Corso: Assemblyman Carlino.

Assemblyman Carlino: Aye.

Assemblyman Corso: Assemblyman Bannigan.

Assemblyman Bannigan: Aye.

Assemblyman Corso: Assemblyman Horan.

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The Chairman: Aye.

Assemblyman Corso: Assemblyman Corso: Aye. (Stops reading.)

The Witness: I should explain he was calling his own name as Secretary of the committee and then voting as a member.

Mr. Scotti: Of course, you recall hearing Senator Greenberg vote "Aye" for the motion.

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The Witness: Yes, as I have told you previously I have a clear personal recollection of Senator Greenberg voting "Aye" on this motion.

The Court: The stenographer testified that his record indicated that, his original notes.

The Witness: That is correct.

(Continuing reading) The Chairman: The motion is carried by a majority of the committee, of the full committee.

357

Mr. Lanza, do you understand the effect of this motion is to grant you immunity so far as any testimony that you may give before this committee?

Mr. Drenzo: The witness at this time would like to make one brief statement.

The Witness: As far as I understand, I have limited immunity.

Mr. Drenzo: (Interrupting the reading) Will the record indicate that where the des-

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ignation "Witness" appears, it's the defendant in this case, Harry Lanza.

The Court: Yes.

The Witness: No question about that.

(Continuing reading) The Chairman: Mr. Lanza, let me advise you, as I did the previous witness, that the immunity provided for by the statutes which may be granted by this committee when pursuing the investigations that I have referred to previously in this statement, is not a limited immunity.

359

Mr. Bauman: Read the first question, please.

(The reporter read the question as follows:

360

"Q. On February 5, 1957, your brother Joseph Lanza was arrested and returned to prison charged with a violation of parole. Tell the committee, please, any and all efforts extended by you to assist in obtaining the release of your brother Joseph Lanza on parole or his restoration to parole.")

Q. Now that immunity has been conferred upon you, will you answer the question, Mr. Lanza? A. I refuse.

The Chairman: On what ground? I think, Mr. Direnzo, we should at this time—

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Mr. Direnzo: (Interposing) At this time will the record indicate that the witness refused to answer that question on the ground that the answer to that question might tend to incriminate him.

Might the record also show that where the witness does refuse to answer in the future, it will be on the same ground unless he states specifically to the contrary.

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The Chairman: All right. The committee orders you to answer the question.

~~The~~ The Witness: I refuse.

Mr. Bauman: Read the next question, please. (Stops reading.)

The Witness: I wanted to indicate to counsel and to the Court that at this time I had called upon the reporter who had recorded the previous questions to read back the questions that I had previously asked, and as the questions were read back I was then asking the witness for a second time to answer those questions.

363

The Court: That was after the vote of the committee to proceed.

The Witness: And to confer immunity.

The Court: And to confer immunity.

The Witness: Yes, sir.

Now I have previously read (Continues reading)

Mr. Bauman: Read the next question, please.

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(The reporter read the question as follows:

“Q. Will you answer the question please, Mr. Lanza.”

Mr. Bauman: Pass that.

The reporter read the question as follows:

365

“Q. Did you have a conversation with your brother Joseph Lanza on February 13, 1957, at the Westchester County Jail?”)

Q. Will you answer that question, please? A. I refuse. —

The Chairman: The committee orders you to answer, Mr. Lanza.

The Witness: I refuse.

Mr. Bauman: Read the next question.

366

(The reporter read the question as follows:

“Q. Did you on that occasion tell your brother Joseph Lanza what you had done and what you were doing in connection with attempting to obtain his restoration to parole?”)

Q. Would you answer the question, please, Mr. Lanza. A. I refuse.

Q. Did you say you refuse? A. That's right.

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The Chairman: The committee orders you to answer.

The Witness: I refuse.

Mr. Bauman: Read the next question.

(The reporter read the question as follows:

“Q. Did you on that occasion tell your brother ‘because they wanted to speed up the thing, you know, and wanted to get a chance’ ”—) 368

The Court: (Interrupting) Have you got the punctuation?

The Witness: I will read the question again, if I may, your Honor.

(Continues reading) Mr. Bauman: Read the next question.

(The reporter read the question as follows: 369

“Q. Did you on that occasion tell your brother ‘because they wanted to speed up the thing, you know, and wanted to get a chance’ and did your brother on that occasion answer, ‘Yes, that’s right, it’s all right. Working good. You know what I mean.’ ”)

Q. Would you answer the question, please? A.
 I refuse.

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The Chairman: The committee orders you to answer.

The Witness: I refuse.

Mr. Bauman: Read the next question.

(The reporter read the question as follows:

371

"Q. When you said 'They wanted to speed the thing up,' were you talking about speeding up the disposition of the violation of parole charge then existing against your brother Joseph Lanza?")

Q. Would you answer the question. A. I refuse.

The Chairman: The committee orders you to answer.

The Witness: I refuse.

372

Mr. Bauman: Read the next question.

(The reporter read the question as follows:

"Q. Did you tell your brother Joseph Lanza that Mr. Dwyer of the New York State Division of Parole was responsible for the charge that was being made against your brother Joseph Lanza?")

Q. Will you answer the question? A. I refuse.

The Chairman: The committee orders you to answer.

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The Witness: I refuse.

Mr. Bauman: Read the next question.

(The reporter read the question as follows:

“Q. In other words, did you say to him, ‘Doud, eh, Doud nothing. It’s Dwyer that’s everything.’”) (Stops reading.)

374

The Witness: The record shows close double quotes, but obviously that closes all quotes, your Honor.

(Continues reading) Q. Answer the question.

A. I refuse.

The Chairman: The committee orders you to answer.

The Witness: I refuse.

Mr. Bauman: Next question.

375

(The reporter read the question as follows:

“Q. How did you know, Mr. Lanza, that Mr. Dwyer was responsible for the bringing of these charges against your brother, Joseph Lanza?”)

Q. Answer the question, please. A. I refuse.

The Chairman: The committee orders you to answer.

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The Witness: I refuse.

Mr. Bauman: Next question.

(The reporter read the question as follows:

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“Q. On that same occasion did you tell your brother in Italian, ‘They wanted to know whether one of the big ones came, understand?’ And did your brother reply to you and by your brother I mean Joseph Lanza, ‘Well, did you see him? He is sitting this week.’ Did that conversation take place?”)

Q. Answer the question, please. A. I refuse.

The Chairman: The committee orders you to answer.

The Witness: I refuse.

378

Mr. Bauman: Next question.

(The reporter read the question as follows:

“Q. When you used the expression ‘They wanted to know whether one of the big ones came,’ were you talking about one of the commissioners of Parole of the State of New York?”)

Q. Answer the question. A. I refuse.

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The Chairman: The committee orders you to answer.

The Witness: I refuse.

Mr. Bauman: Next question.

(The reporter read the question as follows:

“Q. When your brother Joseph Lanza said, ‘Well, did you see him, he is sitting this week,’ did you understand him to mean that the person that was sitting this week was a commissioner of Parole of the State of New York?”) 380

Q. Answer the question. A. I refuse.

The Chairman: The committee orders you to answer.

The Witness: I refuse.

Mr. Bauman: Next question.

381

(The reporter read the question as follows:

“Q. Did you then tell your brother Joseph Lanza, ‘him, no. He is sitting. And they were trying to speed it up, understand, for this week, but he is no good.’”)

Q. Answer the question. A. I refuse.

The Chairman: You refused?

The Witness: That's right.

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The Chairman: The committee orders you to answer.

The Witness: I refuse.

Mr. Bauman: Next question.

(The reporter read the question as follows:

383 "Q. Were you talking about any officer or employee of the Division of Parole of the State of New York?")

Q. Answer the question, please. A. I refuse.

The Chairman: The Committee orders you to answer.

The Witness: I refuse.

Mr. Bauman: Next question.

(The reporter read the question as follows:

384 "Q. In the portion of your conversation just quoted, were you talking about trying to speed up the disposition of the charge of violation of parole in the case of Joseph Lanza?")

Q. Answer the question. A. I refuse.

The Chairman: The committee orders you to answer.

The Witness: I refuse.

Mr. Bauman: Next question.

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(The reporter read the question as follows:

“Q. Now, did you tell your brother Joseph Lanza during that conversation, ‘That one is no good. He is sitting this week and after this week he goes. Then comes Hirsch. Then comes the other, the friend of ours.’ ”

386

Q. Answer the question, please. A. I refuse.

The Chairman: The committee orders you to answer.

The Witness: I refuse.

Mr. Bauman: Next question.

(The reporter read the question as follows:

“Q. Were you talking about commissioners of parole of the State of New York when you stated what I have just read to you to your brother Joseph Lanza?”)

387

Q. Answer the question. A. I refuse.

The Chairman: The committee orders you to answer.

The Witness: I refuse.

Mr. Bauman: Next question.

(The reporter read the question as follows:

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“Q. When you said ‘H is sitting this week and after this week he goes,’ about whom were you talking?”)

Q. Answer the question. A. I refuse.

The Chairman: The committee orders you to answer.

389

The Witness: I refuse.

Mr. Bauman: Next question.

(The reporter read the question as follows:

“Q. When you said ‘Then comes Hirsch,’ were you talking about Commissioner Hirsch— (Stops reading.)

The Witness: This record indicates “Commission Hirsch,” but I think you will agree, Mr. Drenzo, the question was “Commissioner Hirsch.”

390

Mr. Drenzo: I think that's correct.

The Witness: I will reread it now because I have interrupted my reading.

(Continues reading) “Q. When you said ‘Then comes Hirsch,’ were you talking about Commissioner Hirsch of the Division of Parole of the State of New York?”)

Q. Answer the question. A. I refuse.

The Chairman: The committee orders you to answer.

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The Witness: I refuse.

Mr. Bauman: Next question.

(The reporter read the question as follows:

“Q. When you said “Then comes the other, the friend of ours,” about whom were you talking?”)

Q. Answer the question. A. I refuse. 392

The Chairman: The committee orders you to answer.

The Witness: I refuse.

Mr. Bauman: Next question.

(The reporter read the question as follows:

“Q. Was the person about whom you were talking a commissioner of parole of the State of New York?”) 393

Q. Answer the question. A. I refuse.

The Chairman: The committee orders you to answer.

The Witness: I refuse.

Mr. Bauman: Will you turn to the very last question asked Mr. Lanza.

(The reporter read the question as follows:

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"Q. Mr. Lanza, during a conversation with your brother Joseph Lanza on February 13, 1957, at the Westchester County Jail, did your brother Joseph Lanza say to you—' '")

Mr. Bauman: That's not the one I mean. There is one that I asked after that.

395

(The reporter read the question as follows:

"Q. Mr. Lanza, please tell the committee the name of anybody with whom you spoke during the month of February 1957 about the restoration to parole of your brother Joseph Lanza.")

Q. Answer the question. A. I refuse.

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The Chairman : The committee orders you to answer.

The Witness: I refuse.

Mr. Bauman: I have no further questions.

Assemblyman Corso: Mr. Chairman, the witness having refused to testify before this Joint Legislative Committee on Government Operations as directed and ordered, I move that this matter be referred to the District Attorney of New York County for appropriate action by him and that the record of minutes of these proceed-

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ings be delivered to the District Attorney of New York County.

The Chairman: The motion by Mr. Corso. Do I hear a second?

Senator Greenberg: Second.

The Chairman: Seconded by Senator Greenberg. Any discussion?

(No response.) 398

The Chairman: The secretary will call the role on this motion.

Assemblyman Corso: Senator Zaretzki.

Senator Zaretzki: Aye.

Assemblyman Corso: Senator Greenberg.

Senator Greenberg: Aye.

Assemblyman Corso: Senator McGahan.

Senator McGahan: Aye.

Assemblyman Corso: Assemblyman Carlino.

Assemblyman Carlino: Aye. 399

Assemblyman Corso: Assemblyman Bannigan.

Assemblyman Bannigan: Aye.

Assemblyman Corso: Assemblyman Horan.

Assemblyman Horan: Aye.

Assemblyman Corso: Assemblyman Corso. Aye.

The Chairman: The motion is unanimously carried.

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Mr. Dorenzo: I take it that this also is under 1330 of the Penal Law.

The Chairman: All afternoon, Mr. Dorenzo, you've been asking me to interpret the law and give you sections and all of that. I'm sure you don't need my advice on what—

401

Mr. Dorenzo: (Interposing) I think it is important here because that's the observation I think I heard Senator Zaretzki make at the termination of testimony—

The Chairman: (Interposing) Any observation by Senator Zaretzki is not only important but needs no further explanation.

Mr. Dorenzo: I take it it is on the same basis, is that correct?

The Chairman: I think we will recess for about five minutes if you have no objection.

402

Let me say this, that here in New York County you have a gentleman as district attorney whom I consider one of the most competent in the United States of America and I am sure there is no necessity for this committee or anyone else of pointing out to him the procedures that should be followed or how they will be followed.

I'm sorry to keep interrupting here, but its gets insufferable. That's all right now.

Mr. Dorenzo: The witness is excused?

The Chairman: That's right. (Ends reading)

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Mr. Scotti: Now, your Honor, I have produced in Court a transcript of the interrogation of one Louis Georgiano that was conducted before the Joint Legislative Committee of the State of New York on Government Operations on June 19, 1957, in the County of York, immediately prior to the interrogation of the defendant Harry Lanza.

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And the reason for my producing this transcript, I believe, was that Mr. Drenzo had requested the production of this transcript in order to include into the record his endorsement of objections made by Mr. Roseman at the time Mr. Roseman's client, Louis Georgiano, had been interrogated.

The Court: It was I who suggested it.

Mr. Drenzo: That's correct.

The Court: Mr. Drenzo acquiesced in it.

Mr. Drenzo: That is correct.

405

Mr. Scotti: That is correct.

Mr. Drenzo: The idea was to perpetuate the objections made by Mr. Roseman so they can inure to my benefit.

The Court: To inure to your benefit.

Mr. Drenzo: That's right.

Mr. Scotti: I think it is agreed and stipulated by and between Mr. Drenzo and his client, the defendant Harry Lanza, and the People of the State of New York, that the testimony as reflected on the proceedings,

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(People's Exhibit 4 Read into Record)

as reflected on the pages between 1817 and 1823—

The Court: Inclusive?

Mr. Scott: Inclusive, actually took place and should be made a part of the evidence in this particular trial.

Am I correct?

Mr. Drenzo: That's correct.

407 Mr. Scotti: And does the defendant so stipulate and agree?

The Defendant: I do.

Mr. Scotti: May I read?

The Court: Yes, you may.

408 Mr. Scotti: (Reading) The Chairman: There are certain preliminary matters that must be the subject matter of discussion by the Committee. Therefore, rather than have everybody sitting around, the Committee will recess until 12:30 and at that time we will proceed.

In the meantime, I don't believe there is any question but that we will have completed our preliminary discussions, so that in this warm weather we will recess until 12:30.

All witnesses, of course, are under subpoena for today and will be expected to return here at 12:30.

Mr. Bauman: Are they so directed, Mr. Chairman?

The Chairman: They are directed. I assume, in addition to that, there is no ques-

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tion that those subpoenas require them to be here at any time during the day. In any event, they are directed to return here at 12:30.

(Recess until 12:30 p.m.)

The Chairman: Mr. Secretary, will you call the role of the members of the committee present. 410

Assemblyman Corso: Senator Greenberg.

Senator Greenberg: Present.

Assemblyman Corso: Senator Zaretzki.

Senator Zaretzki: Present.

Assemblyman Corso: Senator McGahan.

Senator McGahan: Present.

Assemblyman Corso: Assemblyman Bannigan.

Assemblyman Bannigan: Present.

Assemblyman Corso: Assemblyman Carlino. 411

Assemblyman Carlino: Present.

Assemblyman Corso: Assemblyman Horan.

The Chairman: Present.

Assemblyman Corso: Assemblyman Corso. Present.

The Chairman: Let the record show that a majority of the committee is present.

Mr. Bauman: Louis Georgiano.

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(People's Exhibit 4 Read into Record)

The Chairman: Gentlemen, you know what our rules are. Once before the witness is sworn and that's all.

Will counsel give his name to the reporter.

Mr. Roseman: Arnold D. Roseman, 120 Broadway.

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LOUIS GEORGIANO, having been duly sworn, testified as follows:

By Mr. Bauman:

Q. Will you state your full name, please?

Mr. Roseman: Preliminarily, may I ask which members of this committee are absent?

414

The Chairman: It is a matter of record, counselor.

Mr. Roseman: Is it conceded that several members are absent?

The Chairman: Yes, but a majority is present.

Mr. Bauman: Counsel, would you state your name and office address for the record, please?

Mr. Roseman: Arnold D. Roseman, 120 Broadway in the City of New York.

Mr. Bauman: You represent Mr. Georgiano in this proceeding?

Arnold Bauman—for People—Direct
(People's Exhibit 4 Read into Record)

415

Mr. Roseman: I do.

Q. What is your name, sir? A. Louis Georgiano.

Q. G-i-o-r-g-i-a-n-o? A. G-e-o-r-g-i-a-n-o.

Q. Mr. Georgiano, on February 6, 1957, you checked into the Surfcomber Hotel in Miami Beach, Florida, is that correct? A. I refuse to answer on the grounds that it may tend to incriminate me.

416

The Chairman: The committee directs that you answer the question.

The Witness: I refuse on the same grounds.

Mr. Roseman: A further objection is made on the ground that such question is not related to the issues for which this committee has been set up and it is beyond the purview of this committee.

The Chairman: So there may be no question in the mind of anyone, with the consent of the committee and on behalf of the committee, the Chair will make a statement for the record.

417

This committee has been investigating the facts and circumstances that led to Joseph Lanza's arrest for violation of parole on February 5, 1957 and his restoration to parole on February 19, 1957. In connection with this matter, the committee has been and is still seeking to determine

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(People's Exhibit 4 Read into Record)

whether any persons conspired to commit acts calculated to pervert or obstruct justice or the due administration of the laws, whether any persons conspired to commit a crime, whether any person gave or offered a bribe or caused a bribe to be given or offered to a public officer.

419

That is the purpose for which this committee has been sitting and that is the purpose for which we are again here today.

As I understand it, the witness has claimed his privilege against civil incrimination—

Mr. Direnzo (Interrupting): I think where the word "civil" appears, we should correct it to say "self."

Mr. Scotti: Yes. (Continues reading)

420

As I understand it, the witness has claimed his privilege against self incrimination and you, counselor, have made a further objection?

Mr. Roseman: Yes.

The Chairman: Unless there is some disagreement on the part of the committee, your objection will be overruled. I think the record which is before the committee and the questions to be asked by counsel will fully demonstrate the materiality of this question.

Q. On February 8, Mr. Georgiano, two days after you had arrived in Florida, did you fly back

Arnold Bauman—for People—Direct
(People's Exhibit 4 Read into Record)

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from Miami to New York on Flight 406 of National Airlines? A. I refuse to answer on the grounds that it may tend to incriminate me.

The Chairman: The committee directs you to answer.

The Witness: I refuse on the same grounds.

Mr. Roseman: May I also at this time state for the record that in the counsel's mind is a question of the power in this committee to direct this witness to answer that question and the question preceding on the ground that the committee itself through its counsel and through its members stated to the Governor of the State of New York that it did not have the power to grant immunity and sought such power. And upon the grounds that since this committee on that basis, or, rather, that there is a question of whether or not it has the power, that it cannot direct the witness to answer under the penalty of committing any contempt.

422

423

For that reason, I want to state for the record, this witness' legal contention and as we all know that in order to destroy the privilege against self-incrimination, the power to grant immunity must be as broad as the destruction of that privilege.

The Chairman: First of all, any statement of opinion as to the law by any mem-

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ber or members of this committee does not have the effect of making that the law.

425

I don't believe there has ever been any doubt in the minds of any member of this committee that in the investigation of certain matters as specifically set forth in the Penal Law, that the committee did have the power to grant immunity. The question that arose was as to whether, if the committee broadened the scope of its inquiry, whether then that power would rest in the committee.

426

I think you will particularly note in the statement which I made that this committee is directing its attention now to certain specific possible violations of the Penal Law and I don't believe there has ever been any question in anybody's mind that in pursuing an inquiry as to those particular matters, that the committee does have the power to grant immunity.

Senator Zaretzki: May I say, counselor, that the Chairman has told you in his statement that the charge here is conspiracy or bribery and corruption.

The inquiry is as to those two branches, and as to those Sections 381 of the Penal Code and Section 584 specifically and clearly give to this committee the power to grant immunity in this Lanza inquiry and we have all the power that we need in this inquiry.

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(People's Exhibit 4 Read into Record)

427

The point that you raise as to the request for further powers made by the committee to the Governor has nothing to do with this inquiry whatsoever and was directed to any possible future inquiry in other cases or matters which may arise.

There is nothing before the committee now. It is just supposititious. As to those future inquiries in other unrelated matters, the committee said perhaps we might need greater power. As to this inquiry, there is no question in anybody's mind that we have full and complete power and always had it.

428

Mr. Roseman: I'm sorry, Senator. I must respectfully disagree with your legal contention. (Ends reading)

By Mr. Scotti:

Q. Now, Mr. Bauman, at the time Mr. Georgiano was questioned by the Joint Legislative Committee as well as yourself, and specifically at the time this portion of the proceedings which I have just read into the record, were both the defendant Harry Lanza and his attorney present? A. To the best of my recollection, they were.

429

Mr. Scotti: I believe counsel—

Mr. Drenzo: I am willing to make that stipulation, if your Honor pleases.

Q. So that both Mr. Lanza, Harry Lanza, and Mr. Drenzo were present at the interrogation of

430 *Arnold Bauman—for People—Direct*

Louis Georgiano from the very beginning; am I correct? A. Yes.

Mr. Scotti: Now I have with me, your Honor, a report of violation of parole as submitted by John Clark concerning which Mr. Bauman gave testimony earlier this morning.

I would like to offer this in evidence.

The Court: Has counsel seen it?

431 Mr. Direnzo: I haven't seen it. May I see it.

The Court: You may.

(Mr. Scotti hands document above referred to to Mr. Direnzo.)

Mr. Direnzo: Could I ask for a short recess while I look this over?

The Court: We are not in recess, but we are taking time to read the proposed exhibit.

432 (Defendant and his counsel, Mr. Direnzo, read the proposed exhibit at counsel table.)

Mr. Direnzo: I have no objection to the introduction and receipt of this report of violation of parole in so far as it affects Joseph Lanza, but only to that extent do I consent to its offer into evidence, not in so far as—

The Court: Is there anything in it that would refer to any person other than Joseph Lanza?

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Mr. Direnzo: That's the thing that I am concerned about.

(Whereupon, there was a conference at the bench, off the record and out of the hearing of the defendant, between the Court and counsel for both sides, after which the following proceedings were had on the record in open court:

The Court: The Division of Parole report in connection with the violation of Joseph Lanza is received in evidence, with the understanding that the only part of it that is received in evidence is that which refers to Joseph Lanza, and any part thereof which may refer to the defendant in the case on trial before me is not part of the exhibit.

434

Mr. Direnzo: That's correct.

The Court: And will not be considered by this Court in any respect whatsoever.

Mr. Direnzo: That's correct, your Honor.

435

The Court: Is that satisfactory?

Mr. Direnzo: That is satisfactory, your Honor.

Mr. Scotti: Okay, your Honor. No objection.

The Court: All right.

Mr. Direnzo: The next thing I wanted to know, if your Honor pleases, if they had an available copy.

Mr. Scotti: All I have here is one copy.

436

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Mr. Direnzo: Maybe Mr. Bauman—

The Witness: I am told by the committee investigator who got that that it was very hard to scrape this one up.

Mr. Direnzo, the thing is in evidence. I would have no objection to your having a copy. It's part of a record of a public hearing. If we have one, I will arrange to have it done for you—

437

Mr. Direnzo: May we have one made. I will pay the necessary costs.

The Court: You can have it photostated, or anything you want.

Mr. Direnzo: Could I do that with one of the officers here, or would your Honor trust me with it overnight?

The Court: I will give it to you.

It is not the original, is it?

The Witness: No, sir, it is not.

Mr. Direnzo: All right.

438

The Court: It is received in evidence with that understanding.

(The document above referred to, was received in evidence and marked Defendant's Exhibit B in Evidence.)

The Court: And I shall permit Mr. Direnzo to take it to have it photostated this evening and returned here tomorrow by eleven o'clock.

You keep it in your custody.

Mr. Direnzo: Yes.

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439

Mr. Scotti: I would like to ask one or two more questions of Mr. Bauman.

The Court: You may.

By Mr. Scotti:

Q. Mr. Bauman, will you be good enough to state for the record the names of the members who constitute this committee, the Joint Legislative Committee on Government Operations.

440

The Court: And who constituted it on—

Mr. Scotti: June the 19th, 1957.

A. Yes. They were William F. Horan, Chairman, Senator Walter McGahan, Assemblyman Joseph R. Corso, Senator Austin Irwin, Senator Samuel Greenberg, Senator Henry A. Wise, Assemblyman Daniel S. Dickinson, Assemblyman William H. McKenzie.

Now the Court will notice that Assemblyman William H. McKenzie is listed as a regular member of this committee. He is the chairman of the—

441

The Court: Just a moment, Mr. Bauman.

Will you please read the question back to Mr. Bauman.

(The question was read by the Court Stenographer as follows: "Mr. Bauman, will you be good enough to state for the record the names of the members who constituted this committee, the Joint Legisla-

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tive Committee on Government Operations on June 19, 1957?')

The Witness: I will read the remainder of the names. Senator Walter Mahoney, Assemblyman Oswald D. Heck, Assemblyman Joseph Carlino, Senator Joseph Zaretzki, Assemblyman Eugene F. Bannigan.

Q. In all, how many members are there? A.

443 Eight and five are thirteen.

Q. Is it true that one of the regular members is also a member of the—What do you call that "Ex Officio" Committee?

The Court: It would appear from the resolutions that fourteen persons constituted that committee.

Can you explain how it comes that thirteen constituted the committee in its entirety.

444 The Witness: Assemblyman William H. McKenzie was appointed a regular, and that designation is mine, member of the committee. He is the chairman of the Assembly Ways and Means Committee.

The resolution creating ex officio members specifies the temporary chairman of the Senate, the Speaker and Majority Leader of the Assembly, the Minority Leaders of the Senate and Assembly, the Chairman of the Assembly Ways and means Committee. Now that is Mr. McKenzie, who is the same Mr. McKenzie who

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was regularly appointed to serve as a member of the committee. So the total in this case of regularly appointed members and ex officio members totals thirteen.

The Court: And how many were present?

Mr. Scotti: On June 19, 1957.

The Witness: Seven.

By Mr. Scotti:

446

Q. So that a majority of this committee were present. A. Yes.

Mr. Scotti: Now before Mr. Drenzo proceeds with his cross-examination of Mr. Bauman, may I examine Mr. Devine with respect to a notice. It won't take him long, and I am afraid he is required to leave tomorrow.

Mr. Drenzo: That's agreeable to me.

Might I ask are we going to completely finish tonight, Judge?

447

The Court: We are not.

Mr. Drenzo: Then I think if we aren't, unless you want Mr. Devine—

Mr. Scotti: I will withdraw the request.

Mr. Drenzo: Might I ask your Honor to declare a recess now.

The Court: Yes. I said we will quit at half-past four, and it is half-past four now.

Now before we recess, Mr. Drenzo, I want to rule on your motion for an inspec-

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tion of the Grand Jury minutes in this particular case.

Your motion to inspect the Grand Jury minutes is in all respects denied, so that we have that completed.

(To the witness) Can you be back at eleven o'clock tomorrow.

The Witness: Yes, your Honor.

The Court: Recess to eleven o'clock tomorrow.

449

Mr. Drenzo: Might I also suggest at this time, if your Honor pleases, that all arguments advanced by me in the motion to inspect the Grand Jury minutes be set forth in the record as part of my arguments in this present trial, so that it will be perpetuated for the record?

The Court: If you have a copy of your affidavit upon which you predicated your motion for inspection of these Grand Jury minutes, you may offer it in evidence.

450

Mr. Drenzo: Fine, your Honor.

The Court: And I shall receive it, so that it will be in the record.

Mr. Drenzo: I can produce that tomorrow.

The Court: Off the record.

(Discussion off the record.)

The Court: We will recess until twelve o'clock tomorrow.

Mr. Direnzo: Bail continued, your Honor?

The Court: Bail continued.

TRIAL RESUMED.

New York, January 17, 1958.

Before: HON. JOHN A. MULLEN, J.

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Appearances: The same.

(The defendant is present with counsel.)

The Court: Call the Lanza case.

The Clerk: Harry Lanza, on trial.

Mr. Scotti: Ready.

Mr. Direnzo: Ready.

Mr. Scotti: I will let Mr. Clark examine

Mr. Devine.

453

Mr. Direnzo: May I have the record show that I am returning Defendant's Exhibit B in evidence?

The Court: You have a copy?

Mr. Direnzo: I made a copy of it.

454 *William L. Devine—for People—Direct*

WILLIAM L. DEVINE, of 217 Broadway, New York, N. Y., called as a witness on behalf of The People, being first duly sworn, testified as follows:

Direct Examination by Mr. Clark:

Q. Mr. Devine, are you employed by the Joint Legislative Committee on Government Operations? A. Yes, sir, I am.

455 The Court: Of the State of New York.

Q. Of the State of New York? A. Yes, sir, I am.

Q. In what capacity? A. Investigator.

Q. And were you employed in that capacity during the month of June, 1957? A. Yes, sir, I was.

Q. Did you serve in June, 1957, some notices in a proceeding entitled "Inquiry and Investigation of the New York State Joint Legislative Committee on Government Operations Into the Parole of Joseph Lanza"? A. Yes, sir, I did.

456 Q. Upon whom did you serve the notices? A. On June 17, 1957, I served notification on the office of the Attorney General of the State of New York. I thereafter served a duplicate notice on the office of the District Attorney of the County of New York, and on the morning of the 18th of June, 1957, I served a duplicate copy of the same order on the District Attorney of Westchester County.

The Court: At what time?

Q. At what time on June 18, 1957, did you serve the copy of the notice on the office of the District Attorney of Westchester County? A. Well, I arrived at the office at about a quarter of 10:00, and the assistant to whom I was to give this notice had not yet arrived and the young lady asked me to wait for him, and I recall waiting approximately 15 or 20 minutes. So to the best of my knowledge it would be about 5 or 10 minutes past 10:00 on the morning of the 18th.

Q. Were you at the Bar Association on June 19, 1957, when the hearing was conducted? A. Yes, sir, I was. 458

Q. What time did that hearing begin on June 19, 1957, at the Bar Association? A. I believe it was a little bit after 11:00 o'clock.

Q. Do you have with you a copy of that notice that you say you served on the three officials? A. Yes, sir, I have.

Q. Will you produce it. A. (The witness produces document.)

Q. Is that a copy of the notice that you served on the three officials? A. Yes, sir, it is. 459

Q. And all notices were identical? A. Yes, sir, they were.

Mr. Clark: Then I ask that this copy be marked in evidence as People's Exhibit 6.

Mr. Drenzo: May I see it, please?

(Offered exhibit handed to counsel.)

Mr. Drenzo: No objection.

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William L. Devine—for People—Cross

The Court: Received.

(The notice referred to marked People's Exhibit 6 in evidence.)

Mr. Clark: You may inquire.

Cross Examination by Mr. Direnzo:

461

Q. Mr. Devine, with regard to People's Exhibit 6 in evidence, are those the only persons upon whom you made service of that notice pursuant to Section 2447, is that correct? A. I am the only person?

Q. I say they are the only persons upon whom you made service of that notice, is that correct? A. That's correct.

Q. Did you serve the District Attorney of Buffalo? A. With this type of a notice?

Q. That's right? A. No, sir.

462

Q. Did you serve him with any notice? A. No, sir.

Mr. Direnzo: That's all.

Mr. Clark: No further questions.

Mr. Scotti: Now, Mr. Bauman, I believe, is scheduled to appear at 2:00 o'clock.

The Court: Yes.

Mr. Scotti: May we adjourn at this time?

The Court: We will recess the trial until 2:00 o'clock.

Mr. Direnzo: Bail continued, if your Honor please?

The Court: Bail continued.

January 17, 1958

AFTERNOON SESSION.

Present:

Same appearances, i. e., Michael P. Direnzo, attorney for the defendant; and the defendant present.

For the People: Mr. Scotti and Mr. Clark.

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Mr. Scotti: I was all through, I think, with Mr. Bauman on direct examination yesterday.

The Court: Yes, and we were waiting for Mr. Direnzo's cross examination.

Mr. Scotti: Yes, that's right.

Cross Examination by Mr. Direnzo:

Q. Mr. Bauman, you propounded questions to Harry Lanza the defendant in this case on June 19th, 1957 and prior thereto concerning alleged occurrences between February 5th 1957 and February 19th 1957; is that correct? A. Yes, I did.

465

Q. Now, the material—

The Court: Just a moment, so we do not get the record confused.

With respect to any question which is made the subject of the indictment here, I believe that it has been alleged in the in-

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Arnold Bauman—for People—Cross

dictment that that did not take place until the 19th; and I mention that because of the testimony with respect to the service of the notice on the District Attorney and the Attorney General.

Mr. Direnzo: Yes. I am not concerned with reference to that facet of this except—

The Court: I am.

Mr. Direnzo: Of course. Very well.

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The Court: Because there is a certain provision of the law which requires 48 hours under 2447.

Mr. Direnzo: I am not disputing that notice except in so far as no notice was served on the District Attorney at Buffalo.

The Court: That is in the record.

Mr. Direnzo: Yes, that is in the record.

468

Q. Now, Mr. Bauman, the material or the data that you had available to you before you propounded these questions to the witness came from tapes or recordings of conversations that had been monitored; is that correct? A. Mr. Direnzo, I shall answer that question—

Mr. Scotti: Excuse me, please.

Now, I am afraid that Mr. Direnzo is injecting a matter in this trial which is not really relevant or germane to the issue here.

I don't think it makes a particle of difference what the source of the information was. The question is whether certain ques-

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tions were put to the defendant and whether the defendant wilfully refused to answer those questions.

I think it is immaterial as to what the source was, your Honor, and I object to this question on that ground.

The Court: I can't exclude it. So, counsel may press it.

Mr. Direnzo: Thank you.

A. I started to answer in this way and with the Court's permission I shall answer that question because it is apparent and must have been apparent at the time I interrogated this witness that I had used a transcript later introduced in evidence in—

470

The Court: In the proceedings before—

A. (continuing)—before the Committee before—

The Court: Before the Legislative Committee.

471

A. (continuing)—before the Joint Legislative Committee on Government Operations.

I said, later introduced, but already introduced in evidence.

Mr. Direnzo: Right.

A. (continuing)—before I interrogated Mr. Harry Lanza. To answer your question, I did use a transcript of a conversation which had been re-

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Arnold Bauman—for People—Cross

corded, not under the direction of the Committee to which I am counsel, between Harry Lanza and his brother Joseph Lanza in the Westchester County Jail, but I want to say, Mr. Direnzo—

Q. Go ahead? A. But should you ask me any question with relation to any other confidential information on which my questions were based I shall have to apply to the Court for permission at that time not to answer them.

473

Q. Are you familiar with the 19 counts involved in the indictment before the Court now on which the defendant Harry Lanza is on trial? A. I am not.

Q. Would you be good enough to look at that indictment, please, or a copy, No. 2157-57, and I would suggest Mr. Bauman to make it easier that you just look for the indentations? A. (Witness examines the indictment or a copy.)

Q. —Where the conversations themselves appear? A. I see what you mean.

474

Q. (continuing): The questions.

The Court: Yes.

A. (Witness examines as requested.) I have read the indictment.

Q. Now, I take it also, Mr. Bauman, that you are familiar with these tapes. When I say tapes I mean the recordings which were taken of various conversations at the Westchester County Jail while Joseph Lanza was incarcerated thereat; is that correct? Between February 5 and February 19, 1957. Is that correct? A. I am familiar with the contents of those recordings.

Q. Now, after examining the 19 counts contained in the indictment here, can you tell me whether the data or material on which were propounded your questions were the result of information you gave or gathered from those interceptions? A. I think some of the questions were based upon the recordings of conversations between Joseph and Harry Lanza, and other or others of them as I hastily thumbed through the indictment were not.

Q. Can you show me one of the 19 questions which were not the result of the tapes which you had available to you? A. The first one that occurs to me and this I do not mean to infer is the only one but you asked me to show you one example, the first one I would like to refer to is the count numbered 18th or the last count of this indictment.

476

Mr. Drenzo: The last count is 19, your Honor.

The Witness: Is it?

477

Mr. Scotti: Well, numerically 18th. It is a misprint.

The Court: But it is number 19, to keep the record clear.

Mr. Scotti: Yes, call it Number 19. We will change it, the last one.

The Court: The last count in the indictment.

The Witness: The last count is, I think, numbered in typewriting, 18th.

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Arnold Bauman—for People—Cross

Mr. Scotti: Yes, that's correct, but that should be 19th. There is a numerical mistake there. The one preceding that is called the 19th I think, and the other one is 18th.

The Witness: Yes, that's correct.

479

Q. Would you read the question, Mr. Bauman, please? A. In the last count of the indictment, so there is no confusion of what I am referring to, which is numbered 18th, the question is specified as follows: "Mr. Lanza, please tell the Committee the name of anyone with whom you spoke during the month of February 1957 about the restoration to parole of your brother Joseph Lanza."

Q. You can tell me now, Mr. Bauman, that you didn't ask that question as a result of the information that was made available to you from those tapes? A. I can.

480

Q. You can say that without fear of successful contradiction, is that correct? A. Yes, I think so.

Q. Show me one other question, Mr. Bauman? A. Well, I will start with number One.

Q. Will you do that please? A. Yes (looking through indictment). In the first count, Mr. Durenzo?

Q. Yes. A. The question is quoted as follows: "On February 5th 1957 your brother Joseph Lanza was arrested and returned to prison charged with a violation of parole. Tell the Committee, please, any and all efforts extended by you to assist in obtaining the release of your

brother Joseph Lanza on parole or his restoration to parole? Q. You say that you did not gather any material from the tapes upon which to predicate that question, Mr. Bauman? A. I have said and I say, Mr. Drenzo, that that question as well as the previous one was not based upon any material in the tapes.

Q. You are sure about that? A. Yes.

Q. Will you go to the next one, Mr. Bauman, please? A. The next one, is in that count numbered second.

482

Q. Yes. A. And that is based upon information received from the transcriptions to which you have referred.

Q. Will you go to number three? A. The count numbered third count, it is my best recollection, Mr. Drenzo, that that question phrased as it was, was not based upon the transcription to which I have referred.

Q. But it could have been, is that right, Mr. Bauman? A. I am thinking. I want to be completely fair with you. It could have been based in part upon the transcription but I can not say at this point that it was or was not. I just don't know.

483

Q. Will you be good enough to go to the fourth count? A. In the count numbered fourth in the indictment, that is clearly based upon matter in the recordings to which you referred.

Q. Will you be good enough to go to the fifth count? A. That likewise is based upon material contained in those transcriptions.

Q. Can you tell me where you gathered the material with reference to the sixth count? A. That is the one says "Did you tell your brother Joseph Lanza that Mr. Dwyer of the New York State Division of Parole"?

Mr. Drenzo: That's right.

A. (continuing): That likewise clearly came from the transcriptions to which you refer.

Q. What about the seventh count, Mr. Bauman, please? A. That was based upon the—that question was based upon the fact that I had learned from the transcription and the question mentioned in the preceding count. Is that clear?

Mr. Drenzo: That's correct.

Q. Now, will you try number seven? A. I just did number seven.

Q. Number eight? A. That clearly came—the information clearly came from those transcriptions.

Q. The ninth count? A. The situation is identical there with the eighth count, that came from the transcription.

Q. The 10th count? A. That is the same situation; that did come from the transcription.

Q. The eleventh count, please? A. That too came from the transcription.

Q. The twelfth count? A. That related to matter from the transcriptions which I had previously read to the witness.

Q. The thirteenth count? A. That likewise was based upon the transcriptions to which you have referred.

Q. The fourteenth count? A. That clearly was based upon the transcriptions.

Q. The fifteenth count? A. That was based upon the transcriptions too.

Q. The sixteenth count? A. That too was based on the transcriptions.

Q. The seventeenth count? A. That referred to a part of the transcription which I had previously interrogated Mr. Harry Lanza about. 488

Q. The eighteenth count? A. Now, you mean the count numbered 19th?

Q. Well, let's say the one before the last one?

A. The one that appears in the indictment—?

Q. Yes.

The Court: I have got an 18th count here, in my copy of this indictment.

Mr. Scotti: May I make an amendment at this time, your Honor. As I have, the count that should read 19 actually reads 18. Do you concur in that, Mr. Drenzo? 489

Mr. Drenzo: I do.

Mr. Scotti: And the one that reads 18 should read 19, and that will clear up the mistake. It is a typographical error there.

Mr. Drenzo: So that, for the record—

The Court: Just a moment. In the original indictment, the last count is numbered 18th, and the one before the last is numbered 19th.

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Arnold Bauman—for People—Cross

Mr. Scotti: Yes.

The Witness: I think I can understand this now. It is clear to me that what has happened is starting with the last page of the indictment, the very one that ends Frank S. Hogan, District Attorney, the two pages before that are exactly out of order.

Mr. Drenzo: That's right. One is 23, and 24, but 24 appears before 23.

491

Mr. Scotti: That's right.

The Witness: The two pages just before the signature page are reversed in order.

Mr. Scotti: No.

Mr. Drenzo: In mine it is reversed.

Mr. Scotti: It is in numerical order on the pages.

The Court: To keep this record straight, the copies I think from which the witness may be testifying, and the copy I have, do not actually conform to the original indictment.

492

The Witness: I see.

The Court: Because in the original indictment the 18th count is the last one, and the one before that is the 19th count.

The Witness: May I respectfully ask to see the original indictment, your Honor, so that I can testify from that?

The Court: Yes.

The Witness: Now, sir, may I with counsel for both sides point out what I mean to the Court about the original?

Arnold Bauman—for People—Cross

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Mr. Direnzo: Except that Mr. Scotti's is not like ours.

The Witness: This is the original indictment I am holding here.

Mr. Scotti: Let us look at the original.

The Witness: The original indictment has two pages out of order. The page on the original indictment number 23 obviously should be page 24; and the page on the original indictment presently numbered 24 obviously should be page 23. When you read the context, your Honor, it is clear that those two pages were mistakenly—

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Mr. Scotti: Just a minute. May I make the amendment and simplify matters, your Honor?

The amendment I make is this, your Honor: that count 18 on page 24 of the original indictment should read 19th instead of 18th; and the count which reads 19th count should read 18th on page 23, instead of 19th; and that will correct matters without shifting pages.

495

The Witness: The language does not follow along.

Mr. Scotti: You can't shift the pages, because the other part is the 17th count.

The Court: Have you got the original, Mr. Witness?

The Witness: Mr. Scotti has it.

Mr. Scotti: Here it is, your Honor.

The Court: My copy was correct in numerical order.

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On the original indictment—

Mr. Scotti: I suppose we caught it too late, sir.

The Court: That is why, I was following a copy here instead of the original.

Now, you move, Mr. Scotti, to have the indictment amended to the extent that on page 24 thereof where the words 18th count are used, that should be changed to 19th count?

497

Mr. Scotti: Yes, that's correct, your Honor.

The Court: Is there any objection to that?

Mr. Drenzo: No objection, your Honor.

The Court: It is so ordered.

Now, you move further that where on page 23 of the original indictment the number 19th count is used, that that be amended to read 18th count?

498

Mr. Scotti: That's correct, your Honor.

The Court: Is there an objection?

Mr. Drenzo: No objection.

The Court: So ordered.

The Witness: Now, just—

Mr. Drenzo: I don't think Mr. Bauman agrees.

The Witness: It is not my function to agree but would you do me the favor of reading me the question to which you are referring in these 18th and 19th counts?

Mr. Scotti: Yes—

The Witness: So that I am perfectly clear on this, you are asking me about—

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Mr. Drenzo: I think this will be count number 19.

Q. With reference to the following question—

Mr. Scotti: That is on page 24.

Q. (Continuing) —which was propounded to the witness on June 19th 1957 at the Bar Association Building before the Joint Legislative Committee— A. On Government Operations.

500

Q. —on Government Operations,— Well, we will refer to it as Joint Committee. A. Well, his Honor indicated a desire to identify it.

The Court: Yes.

Q. (Continuing) —“Question: Mr. Lanza, please tell the Committee the name of anybody with whom you spoke during the month of February 1957 about the restoration to parole of your brother Joseph Lanza.”? A. That question was the one I previously said was not based on the—

501

The Court: He has already testified to that.

Mr. Drenzo: Mr. Bauman wants me to clear this facet up for him and he suggested I read the question as it appears in the indictment and that is the only reason why I am doing it.

Mr. Scotti: Correct.

The Court: All right.

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A. That one was not based upon any information coming from the tape. That was a general question based on a general desire for information.

Q. And now with reference to the 19th count of the indictment to which I read, the following question:

“Question: Was the person about whom you were talking—

503

Mr. Scotti: That's the 18th.

The Court: That is now the 18th.

Mr. Direnzo: Yes, that is now the 18th.

The Court: Please remember that we have amended the indictment.

Mr. Direnzo: Yes. Yes.

Mr. Scotti: That would be the 17th, the one you are reading.

Mr. Direnzo: The 17th.

504

Q. “Was the person about whom you were talking a Commissioner of Parole of The State of New York?”. A. That question was based upon the transcriptions of the recorded conversations.

The Court: Mr. Scotti, you said before that that is the 17th count. I believe that is the 18th count.

Mr. Scotti: No, your Honor. That is part of the 17th count he was reading from.

The Court: I am sorry.

Mr. Scotti: The 17th count. That is right above the 18th.

The Court: It is just above the 18th.

Mr. Scotti: Yes, it is just above the 18th, your Honor.

The Court: Yes, you are right.

Q. Now, Mr. Bauman, these tapes of recording represented three in number, is that correct? A. Yes.

Q. Incidentally, was it found that there were any deletions on any of these tapes? A. Not to my knowledge.

Q. Was there some testimony offered before the Committee that there were deletions? 506

Mr. Scotti: Just a minute. Objection. Are we going to try the issue—?

Mr. Drenzo: I am just going to ask one or two questions on this score.

Mr. Scotti: May I make my objection, please?

I think we are going far afield, your Honor. With all due respect to your Honor's ruling, I think this is extremely collateral to the issue in this case, and I don't think he should be permitted to go further afield. 507

The Court: Well, I know what his purpose is, and it is in the event that I rule adversely to his defendant, that he may preserve certain rights which he thinks he might assert in the Federal Court.

Mr. Drenzo: That is correct, your Honor.

The Court: And I am going to permit him to do it.

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Mr. Direnzo: Also in the State Court.

The Court: Well, I know you will do it in the Federal Court.

Mr. Direnzo: That's right.

The Court: That is what is on your mind. So I—

Mr. Scotti: I still don't see the connection with the issue.

The Court: I don't agree either, but I am not the United States Supreme Court.

509

Q. Was there some testimony before the Committee, Mr. Bauman, that there were some deletions on these tapes? A. My recollection, sir, and I may be wrong, and if you can refresh me to the contrary I wish you would, was that there was no such testimony before our Committee.

Mr. Direnzo: I see.

510

Q. Now, is it fair to state that these tapes represent recordings of conversations between Joseph Lanza and the defendant Harry Lanza? A. My recollection is that there was one such conversation recorded.

Q. Is that correct? A. And it is my recollection and I may be wrong, was that that conversation was recorded on February 13th.

Q. Now, the tapes also record recordings of conversations between Ellen Lanza and her husband Joseph Lanza? A. Yes.

Q. And did the tapes represent recordings of conversations between Sylvester Cosentino the lawyer for Joseph Lanza at that time, and Joseph

Lanza? A. Well, since you have asked the question in that form, I must answer that this way: There was one very brief, very brief conversation recorded in which Mr. Cosentino participated, only one, and very brief.

The Court: I think Mr. Cosentino refused to testify further, and the Court of Appeals of this State upheld his right not to testify because of possible attorney-client relationship.

512

The Witness: That, sir, I understand to have taken place, not as a result of our Committee hearing but as a result of Mr. Cosentino's taking that position before the Commissioner of Investigation who sought to have him punished for contempt in an action by the Attorney General.

The Court: Yes.

Mr. Scotti: I think that matter is up before the United States Supreme Court. Is that correct, Mr. Direnzo?

513

Mr. Direnzo: They did not entertain certiorari. They denied certiorari.

Mr. Scotti: They denied certiorari.

Q. Now, these recordings, they were made at the Eastview Prison in Westchester County; is that right? A. The Sheriff's Westchester County Jail is the place I know it as.

Mr. Direnzo: Just so I know we have the right place.

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The Witness: Mr. Hunter corrected me at least five times on that, during the hearings.

Q. Now, Mr. Bauman, these recordings took place some time between February 5th and February 19th; is that correct? A. Yes.

Q. On and between those dates; is that correct? A. Yes.

515

Q. Now, there was no court order for these interceptions, were they? A. Well, I could testify to hearsay. I had nothing to do with making of the recordings, nor did any member of my Committee. If you want me to, I will be happy to testify to hearsay.

Mr. Scotti: Your Honor, may I be permitted to make the observation at this time, in the way of an objection, that at that time there was no requirement for a court order.

516

The Court: The witness may testify to what he knows, but not to any hearsay.

Mr. Scotti: The law was passed effective July 1st 1957 and prior to that I assume the Court will take judicial notice that there was no such law requiring an order.

The Court: The law speaks for itself, but the witness may testify only to what he knows.

The Witness: Your Honor, may I in fairness to the Committee make clear what I said before.

Mr. Drenzo: At this time may I in view of the statement—will you stipulate, Mr.

Scotti, stipulate that there was no such court order for these interceptions?

Mr. Scotti: I will only stipulate that there was no requirement for a court order.

Mr. Drenzo: I know your position, Mr. Scotti, but I am now asking you whether you will stipulate there was no such order.

Mr. Scotti: I don't know. How can I stipulate to something I have no knowledge about?

The Court: You can't stipulate on anything unless you know it.

Q. Mr. Bauman, do you know it? A. Well, I know what the witnesses testified before my Committee.

The Court: No. Do you know of your own knowledge? Have you ever seen any court order?

The Witness: I haven't seen one. I made no search for one. I don't know of my own knowledge; but I started to ask the Court and I will ask counsel for permission to say in fairness to the Committee again, that the Committee had no part in the making of those recordings. It was done without our knowledge, and we came by the product of them later.

The Court: Well, you know nothing about how they came about?

The Witness: Other than what I have heard in the hearings, your Honor.

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Q. Now, Mr. Bauman, so that I can clear up the point; can you tell me who was responsible for the interception?

Mr. Scotti: Your Honor, I am going to object to this. I don't see the relevancy. We are going far afield here.

Mr. Direnzo: In order to protect the record.

521

Mr. Scotti: What record are you protecting?

Mr. Direnzo: On this point, your Honor. I want to be in a position to call the individual or individuals responsible for it, to ascertain and have them testify for the record, that there was no such court order.

That's the only purpose for asking the question.

522

The Court: You may ask the witness any question with respect to what the witness knows of his own knowledge, not what somebody else has told him.

Mr. Direnzo: Now I am asking him whether he knows who made the interception.

Mr. Scotti: And I object, your Honor, on the ground that it is highly irrelevant and immaterial.

The Court: He may answer yes or no.

Mr. Scotti: And I don't think he should disclose anything if it happens to be of a confidential nature. It is not relevant here.

The Court: He knows what knowing means. Do you know who made the interception? Were you there?

The Witness: No, sir. My only information as to this entire matter is based upon what I have heard in the hearings of the Committee.

The Court: Well, that is hearsay.

Q. Mr. Bauman, you were present at all of the hearings, were you not? A. Yes, sir, I was.

524

Q. And you conducted all of the examinations at the hearings? A. Yes; along with members of the Committee. Yes, I basically conducted the inquiry.

Q. Did anyone having personal knowledge of the transaction involving the interception or monitoring of these conversations at the Westchester County Jail testify before that Committee? A. Yes.

Q. Can you tell me who that individual was? A. Mr. Dwyer of the Division of Parole.

525

Q. Did Mr. Dwyer ever— A. Pardon me, I am not through. Sheriff Hoyer of Westchester County; and the individual in charge of the Sheriff's Westchester Jail whose name evades me at the moment; as well as the men who actually supervised the recording of these conversations, all testified before the Committee in public session, and I interrogated them.

Q. Did Mr. Dwyer testify that he was the one who ordered the bug?

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The Court: We are not interested in what Mr. Dwyer testified to.

Mr. Direnzo: That's the only way, your Honor, that I can learn who was the one who should have gotten the order, if one was necessary.

The Court: If you put Mr. Dwyer on this stand you can find out, if there is anything material.

527

Mr. Direnzo: That's the only way I can do it—

Mr. Scotti: I renew my objection on the ground I don't know what issue he has in mind.

The Court: I don't.

Mr. Scotti: We are getting away from the issue of this trial here. If he is trying some imaginary issue, that really does not belong in this forum—

Mr. Direnzo: I am not trying any imaginary issue.

528

The Court: I shall not permit hearsay testimony in this particular matter, —that is clear.

Q. Mr. Bauman, in all of the proceedings before the Committee did anyone testify that they had an authorization be it by court order or otherwise to intercept or monitor those conversations at the Westchester County Jail?

Mr. Scotti: I again object.

The Court: Sustained.

Mr. Direnzo: I respectfully except.

Q. You know, do you not, that Harry Lanza, Ellen Lanza and Joseph Lanza did not consent to the monitoring of those conversations, do you not?

Mr. Scotti: I object on the ground that is absolutely irrelevant and immaterial to the issue.

The Court: Will you please reframe your question in an interrogative form, and the witness may answer, if he knows.

530

Q. Do you know whether Joseph Lanza consented to the monitoring of any conversation while he was in the Westchester County Jail between February 9th and February 19th 1957?

Mr. Scotti: I object to the question; it is irrelevant and immaterial to this issue.

The Court: I shall permit that question to be answered. Do you know?

531

The Witness: Sir, I have seen an affidavit—

The Court: That is not knowing.

The Witness: And that's the only basis—

The Court: That is not knowing.

The Witness: —of any answer.

The Court: You know what knowing means.

A. No, I do not know of my own knowledge.

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Q. Do you know whether Joseph Lanza consented to it. A. As I say, I just explained that, that I have no independent knowledge, Mr. Di-
renzo.

Q. Do you know whether Harry Lanza consented to— A. I just know what was testified to, and what I read in the affidavits submitted in Lanza against The Joint Legislative Committee, an action in the Supreme Court of New York
County.

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Q. And, do you know whether Ellen Lanza consented to it? A. I don't know.

Q. It is a fact, is it not, Mr. Bauman, that neither Joseph, Harry nor Ellen Lanza consented to the monitoring of those conversations at the prison? A. Any answer I could give you would be based upon what I have learned from the sources I have indicated.

The Court: I have told you that you may not testify to that.

534

You may testify to what you know.

Q. In any event, Mr. Bauman, no written authorization was submitted before the Committee when testimony concerning these recordings was taken before your Committee; is that correct. A. That is correct.

The Witness: I remember the name I couldn't remember before. The Warden of the Westchester Sheriff's County Jail was named Warden Allen.

Q. And no oral authorization was offered before your committee to show the authorization for the monitoring of those conversations on and between February 5, 1957, and February 19, 1957?

Mr. Scotti: What is that question?

A. Repeat that question again.

Mr. Drenzo: It was the same question. One was oral authorization and one was written authorization. 536

Mr. Scotti: I am going to object to this.

The Court: Sustained.

Q. You do not have here in court, nor have you produced to the District Attorney any written authorization or court order for monitoring of the conversations between Joseph Lanza and Harry Lanza in Westchester County Jail on or between February 5th and February 19, 1957, have you?

Mr. Scotti: Your Honor, I object to this. 537
The law is clear, to begin with, and no order was required for eavesdropping. The law went into effect July 1, 1957. There was no order required for a peace officer to eavesdrop, or any law enforcement officer for eavesdropping, for him to get a court order.

The Court: I appreciate that. But he may answer.

The Witness: Would you read the first part of the question?

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The Court: Read it.

(The question was repeated as follows:

“Q. You do not have here in court, nor have you produced to the District Attorney any written authorization or court order for monitoring of the conversations between Joseph Lanza and Harry Lanza in Westchester County Jail on or between February 5th and February 19, 1957, have you?”)

539

A. I have not.

Q. And you have no such order for the same period of time at the same place between Ellen Lanza and Joseph Lanza; is that correct?

Mr. Scotti: I renew my objection.

The Court: Objection overruled. You may answer.

540

A. I haven't.

Q. And you have none for a conversation during the same period of time at the same place between Sylvester Cosentino and Joseph Lanza; is that correct?

Mr. Scotti: I renew my objection.

The Court: Overruled.

A. I have not.

Q. Now, the members of the committee present at the Bar Association hearing building on June

19, 1957, were all lawyers; is that correct? A. I am not sure. May I see the list of those present again, please? I am not sure, by the way, that Senator McGahan is a lawyer, and I would like to look at the list, if I may, for just a moment.

The Court: Yes.

A. (Continued) Mr. Horan is a lawyer, Mr. McGahan I am not certain of, Mr. Corso is a lawyer, Senator Greenberg is a lawyer, Mr. Dickinson is a lawyer, Joseph Carlino is a lawyer, Eugene Bannigan is a lawyer, Joseph Zaretski is a lawyer. Have I named them all?

542

Mr. Clark: You may look at People's Exhibit 4 in Evidence. Then you cannot go wrong.

The Witness: The only one of whom I am not sure is Senator McGahan. I don't know. The rest are lawyers.

543

Q. And they are all legislators in the New York State legislature? A. Yes.

Q. These are the men that enact our laws; is that correct? A. I think it is reasonably obvious, yes.

The Court: I will take judicial notice of it.

Q. Now, questions had been propounded to Harry Lanza, and the defendant as a witness invoked his constitutional privilege against testify-

ing to anything which he said may tend to incriminate him; is that correct? A. Yes.

Q. And he invoked this privilege to the various questions which you propounded to him; is that also correct, Mr. Bauman? A. As I read them yesterday.

Q. And then it was at that point that Assemblyman Corso made the following statement, and tell me if this is correct:

“Assemblyman Corso: Mr. Chairman, I move, despite the objections of the witness, that he be not excused from testifying, and that the witness be ordered to testify, and that if the witness complies with the order to testify, he be granted immunity as authorized by Sections 2447, 381 and 584 of the Penal Law of the State of New York, so that he shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he might answer or produce evidence, and that no such answer given or evidence produced by him shall be received against him upon any criminal proceedings.”

Is that statement correct, Mr. Bauman? A. Assemblyman Corso made such a motion, and I assume since you read it from the record it is in the words that he uttered.

Q. I think I read it exactly. A. I am sure you have. I remember him making such a motion and referring to the three sections of the law you read, if it is true he made it in exactly the words you used.

Q. And it was then, after a number of questions had been asked of the defendant Harry Lan-za, and he continued to invoke this privilege, that the committee took the following action, and again I read from the record, and I want you to tell me whether this is correct or not.

The Court: Are you referring to any of the questions which are made the subject of any count in the indictment?

Mr. Direnzo: They are preliminary. They are all of the counts in the indictment, if your Honor pleases. In other words, it was after all of the questions which constitute the framework of this indictment that this following statement was made by the committee.

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The Court: You have referred to a statement made by Assemblyman Corso. In the record yesterday there was a statement that a vote was taken thereon and that everybody present voted in favor of it.

549

Mr. Direnzo: Yes. I omitted to state that, and will the record stand corrected?

Q. The statement by Assemblyman Corso:

“Mr. Chairman, the witness having refused to testify before this Joint Legislative Committee on Government Operations as directed and ordered, I move that this matter be referred to the District Attorney of New York County for appropriate action by him, and the record of minutes of

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these proceedings be delivered to the District Attorney of New York County."

Is that an accurate transcription of what Assemblyman Corso said? A. It is, to the best of my recollection.

The Court: It is already in the record.

551

Q. And then a motion was taken by the various committee members present? A. A vote was taken on that motion.

Q. Yes, taken on that motion, and then all voted "Aye"; is that correct? A. That is correct.

The Court: It was testified to also that those present constituted a majority of the committee.

The Witness: That is correct, your Honor.

552

Q. Now, Mr. Bauman, without telling me what was actually said, did you as Chief Counsel to this committee, discuss with the committee and its members what course was to be followed in dealing with a witness when the witness Harry Lanza—

Mr. Scotti: Your Honor, I object to this question on the ground it is completely irrelevant to the issue in this case. We are not interested in the workings of the mind of this witness or the members of the committee. We are interested in the operation of law.

The Court: Sustained.

Mr. Drenzo: May I be heard on that point, if your Honor pleases?

The Court: You are a lawyer. You are asking another lawyer something about what was said to his client, and I see nobody here in the nature of a client who is in a position to waive the confidentiality.

Mr. Drenzo: I did not ask him, if your Honor please, to tell me what the conversation was. I asked him whether he would tell me whether he discussed it, and that would only resolve itself into a yes or no answer.

554

Mr. Scotti: I object to this because it is completely irrelevant. Who cares whether he discussed it or not. We are interested in the fact that certain questions were put to this witness and he refused to answer the questions wilfully.

Mr. Drenzo: I submit, if your Honor please—

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Mr. Scotti: And further, the issue is one which involves the thinking of any particular member of that committee and its Chief Counsel.

Mr. Drenzo: I submit, if your Honor pleases, if I ask the question I deem it essentially material, and I will explain to the Court why. There were several courses available to this committee in dealing with a witness that the committee felt was re-

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calcitrant. It had remedies available to it under the legislative laws, it had remedies available to it under the Penal Law. To that extent, if your Honor pleases, it is important because the elements necessary to constitute a violation of this Section 1330 or one of the others requires certain essentials, and it is for that purpose that I seek an answer to the question.

557

Now, if your Honor feels under these circumstances, after I have made my point, that I am not entitled to an answer, I will abide by your Honor's ruling.

The Court: Objection sustained.

Mr. Drenzo: I respectfully except. Might I just ask this question, if your Honor please? And I don't mean to be insulting in propounding the question.

The Court: Go ahead and put it.

558

Q. Did you discuss with the members of the committee the question of dealing with this witness, the defendant in this case, Harry Lanza, with regard to a possible violation of Section 1330 of the Penal Law? Yes or No?

Mr. Scotti: I object to this question, your Honor. I don't see the propriety or relevancy of it.

The Court: Sustained.

Mr. Drenzo: I respectfully except.

Q. Now, can you tell the Court on how many occasions Harry Lanza was called as a witness

before the committee or before the sub-committee? A. Well, my recollection is that he was called in executive session. He was also called in a public session, in the first group of public hearings, and then was called again on June 19th.

Q. Now, you as Chief Counsel to this committee, had full knowledge of this entire investigation as it was reported to you by your various investigators of the witness; is that correct, Mr. Bauman? A. Yes.

Q. And is it fair to state that Harry Lanza, the defendant in this case, was one of your chief objects of inquiry?

560

Mr. Scotti: Just a minute, your Honor. I object to this question. I don't understand the question in the first place.

The Court: Sustained.

Mr. Drenzo: All right, then. Is the objection made to the form of the question or is it ambiguous?

Mr. Scotti: It is very vague and indefinite, to begin with.

561

Q. Is it fair to state, Mr. Bauman, that as far as the investigation was concerned, Harry Lanza was one of the chief objects of your investigation?

Mr. Scotti: I object to that. I don't understand what he means by "objects." Does he mean—

The Court: The resolution speaks for itself. It is in evidence, the resolution creating the committee.

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Mr. Scotti: I am afraid that Mr. Direnzo is confusing a legal matter he has in mind with this question. Does he mean in the sense that he is a potential defendant? Let us call a spade a spade.

Mr. Direnzo: I will get to that next, if your Honor pleases. He couldn't make a man a defendant. He is not a district attorney.

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Mr. Scotti: That is right. So I ask that he reframe his question and ask the question more candidly and directly, so that this witness can be in a position to answer it forthrightly and directly.

The Court: Clarify your question, Mr. Direnzo.

564

Q. Did you regard Harry Lanza as a possible defendant in a criminal prosecution? A. I didn't think in those terms, Mr. Direnzo, but I did think that Harry Lanza was one of the most important witnesses before the inquiry. I felt that he was one of the most able to help the committee in investigating this matter.

Q. That is an answer.

The Court: Strike it out.

Mr. Scotti: What is your Honor striking out?

The Court: I am striking out counsel's comments.

Mr. Direnzo: May I consent to that, your Honor, because I don't want the rec-

ord to show that I wilfully did anything like that.

Mr. Scotti: I thought you were referring to the actual answer, your Honor.

The Court: The comment of counsel was stricken out.

Q. Is it not a fact that at the sub-committee hearing I challenged the right of the committee to swear the witness Harry Lanza? A. May I see the minutes?

566

Q. Mr. Bauman, that was sub-committee. I never got those. A. Executive session?

Q. Yes. A. Mr. Direnzo, I am sorry. I just don't remember.

Q. Frankly, I asked for those minutes but they wouldn't make them available.

Mr. Scotti: We don't have them.

Mr. Direnzo: I ordered them.

Mr. Scotti: You mean the executive session?

567

The Witness: The executive sessions of our committee are not generally available, Mr. Direnzo, and I must tell you, since that executive session was held I just don't remember.

Q. Let me ask you, Mr. Bauman, whether you can search your own recollection and tell me whether you have a recollection after I mention it to you, that I stated to the committee in executive session that Harry Lanza was a target of

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this inquiry and as such should not be sworn as a witness?

Mr. Scotti: Now, your Honor, just a minute.

Q. Did I say that?

569

Mr. Scotti: I object to it. Whether he said it or not, it has no place in this trial. It is purely gratuitous and completely unwarranted in the light of the testimony here. I repeat my objection.

The Court: Objection sustained.

Q. Mr. Bauman, will you make the legislative sub-committee minutes available to me? Can you get them? A. I have no authority to do that.

570

Mr. Direnzo: May I ask the Court to direct that those minutes be produced?

The Court: I have no authority over this legislative committee. I am part of the judiciary.

Mr. Scotti: I suppose there is a way of getting them in the record if he chooses to get them in the record. He can take the stand.

Mr. Direnzo: I don't like to take the stand, Mr. Scotti.

Mr. Scotti: I won't cross examine you on that.

Mr. Direnzo: I don't like to take the stand. I represented a lot of witnesses be-

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fore the committee and it is my recollection that that did happen.

Mr. Scotti: Frankly, your Honor, it does not matter if he is willing to take the stand and testify. Rather than deferring or prolonging this trial, let him testify to it, because it has no place, in my humble judgment, with all due deference to your Honor, it has no place in this trial at all. It is completely irrelevant and gratuitous.

Mr. Drenzo: And your Honor knows I am predicating it on the theory of People vs. Gillette, and so does Mr. Scotti.

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The Court: Any facts that you think are pertinent and material to your contention I will permit you or anybody else to testify to, if they can testify of their own knowledge.

Q. Now, Mr. Bauman, after one of the appearances of Harry Lanza before the joint committee, but before June 19, 1957, was there ever an occasion where the committee ever voted in open session that he, Harry Lanza, was either in contempt or that proceedings to do so would be commenced against him?

573

Mr. Scotti: I object to this, your Honor. Even assuming that happened, it does not affect this trial at all; it has no bearing on the issue here.

The Court: What is the materiality?

Mr. Drenzo: The materiality of this is as follows: If a witness is designated by

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a legislative committee and it is indicated to him that he is about to become a defendant, the contempt would be a criminal contempt; there might be a civil contempt. He is a witness before that committee. Knowing the powers that the committee does possess, he is alerted to the fact that he is about to become named as a defendant in a possible criminal prosecution. Now, that occurred prior to June 19, 1957, and I state under those circumstances that on June 19th this committee had no right to even question him or swear him as a witness.

575

The Court: Mr. Direnzo, you know as a lawyer that before this court a person might be held in contempt under these judiciary laws, and for that same contempt might later be indicted by a Grand Jury for a criminal contempt, which would make him guilty of a misdemeanor if convicted.

576

Mr. Direnzo: Except, your Honor, if we want to follow the reading of 1330 we cannot even call it contempt. In 1330, a willful refusal to testify, they seem to distinguish—

Mr. Scotti: Are we going to argue an issue of law at this point or can we defer it until later?

The Court: Your explanation of the materiality is not persuasive.

Mr. Direnzo: I take it your Honor rules against me at this point?

The Court: I do.

Mr. Direnzo: I note my exception to your Honor's ruling.

Q. Mr. Bauman, did I make the following statement before the committee on June 19, 1957? I am reading from page 1853:

“Mr. Direnzo: At this time, if it pleases the committee, I object to any questions being propounded to this gentleman on the ground that at all his appearances before this committee in which he gave testimony, this committee voted that he be held in contempt, and I think under the circumstances since his conduct has been deemed contumacious by this committee I don't think under the circumstances you can propound questions to him at this time.” 578

Did I make that statement to the committee?

Mr. Scotti: I think it is conceded. It is part of the exhibit in evidence. 579

The Court: It is in evidence and part of the record in this case.

Mr. Scotti: Are you reading from the exhibit?

Mr. Direnzo: Yes.

Q. Now, Mr. Bauman, on the various appearances of the witness, the defendant Harry Lanza in this case, before the committee or the sub-

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Arnold Bauman—for People—Cross

committee, only on one occasion was he offered immunity; is that correct? A. Yes, sir.

Q. And that was on June 19, 1957; is that correct? A. Yes, sir.

Q. Is it fair to state that on each of the occasions when he appeared before the committee and was asked questions, he was asked substantially the same questions on each of those occasions?

581

A. As I told you before, Mr. Direnzo, that executive session was held under such harried and hurried circumstances that I don't remember too much of what I asked him on that occasion. But as to the two public sessions, namely, the one of June 19th and the one that preceded it, the questions were pretty substantially similar.

Q. And on each of the occasions where the witness appeared before the committee and these various questions were propounded to him, as to which questions he evoked his privilege, there was a direction by the Chairman to answer the questions; is that correct? A. Yes.

582

Q. But it was only at the June 19, 1957, session that this alleged grant of immunity was given to him pursuant to 2447, 381 and 584; is that correct? A. Yes.

Q. Now, did you or your committee or members of the committee, or the Chairman of the committee, have occasion between the April 8, 1957, session and the June 19, 1957, session, to go to Albany to see the Governor of the State of New York?

Arnold Bauman—for People—Cross

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Mr. Scotti: Now, I am going to object to this, your Honor. It is entirely irrelevant.

The Court: Sustained.

Q. Between April 8, 1957, and June 19, 1957, did you seek legislation to broaden the committee's powers with reference to immunity?

Mr. Scotti: I object to this, your Honor. It is highly irrelevant.

584

The Court: Sustained.

Q. Can you tell the Court if you know why immunity, this alleged immunity, was not granted to the witness prior to the June 18, 1957, session?

Mr. Scotti: I object to this, your Honor. It is completely irrelevant and immaterial.

The Court: Sustained.

Q. Did you on behalf of your committee ever seek broadened powers for the committee on the question of immunity?

585

Mr. Scotti: I object to this, your Honor.

The Court: Sustained.

Q. Did the Committee or did you seek the assistance of the Governor of the State of New York before the June 19, 1957, session of your committee, seek special legislation with reference to immunity added to the agenda on the Governor's calendar?

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Arnold Bauman—for People—Cross

Mr. Scotti: I object to this, your Honor.

The Court: Sustained.

Mr. Drenzo: Do I take it, if your Honor pleases, that I cannot offer any testimony here with reference to the action taken by this committee on the question of immunity, to show—

587

The Court: I am not interested in what the committee did; I am interested in what the evidence in this trial produces, and what the law affecting it is.

Mr. Drenzo: May I note my exception to your Honor's ruling.

Q. Mr. Bauman, did you prior to June 19, 1957, on the occasions when you questioned the defendant Harry Lanza, feel that you—Withdrawn—did you feel at those sessions where you examined Harry Lanza prior to June 19, 1957, that the committee had adequate immunity powers to grant to a witness testifying at the hearing?

588

Mr. Scotti: I object to this, your Honor. Completely irrelevant.

The Court: Sustained.

Q. Did you ever state to anyone that your committee did not possess adequate immunity powers for that purpose?

Mr. Scotti: I object to this, your Honor.

The Court: Sustained.

Mr. Drenzo: I respectfully except. Will the Court bear with me for just a moment, please?

Motion to Strike Testimony

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The Court: Yes.

The Witness: Sir, may I step from the witness stand to talk to a gentleman I must talk to for just one moment?

The Court: Yes.

(The witness leaves the stand and then returns.)

The Witness: Thank you very much, sir.

Mr. Drenzo: Maybe Mr. Scotti will concede this, as to these witnesses testifying before the Grand Jury: Mr. Bauman, Mr. Zuck and Mr. Devine, that they were the only three witnesses? 590

Mr. Scotti: That is right.

Mr. Drenzo: I have no further questions.

The Witness: Am I excused now?

Mr. Scotti: I haven't finished.

Mr. Drenzo: I want to make a motion at this time, if your Honor pleases, to strike out a portion of Mr. Bauman's testimony, and I would like to make that for the record so that it will be preserved, if your Honor pleases. 591

The Court: You may do so.

Mr. Drenzo: Insofar as any testimony has been offered here, if your Honor pleases, concerning interceptions of conversations, or the monitoring of the conversations from which—monitoring either of the conversations between Ellen

592

Motion to Strike Testimony

593

Lanza and her husband, Joseph Lanza, or the conversation between the defendant in this case, Harry Lanza, and his brother, Joseph Lanza, or the conversation between Sylvester Cosentino and Joseph Lanza, his client, that insofar as any of the material was the basis of the questions which Mr. Bauman obtained and therefrom propounded questions to this defendant, I move that all of that testimony be stricken on the ground, first, that it was obtained without the consent of the defendant or Joseph Lanza or Ellen Lanza or Sylvester Cosentino, express or implied; that it was obtained without any court order. On the further ground that it is definitely morally wrong, and that having obtained the data from which these questions could be propounded, that it could hardly be said that the questions propounded to the witness (1) would be legal, or (2) would be proper.

594

Aside from the fact that there are certain fixed notions and concepts that we as lawyers practicing in criminal courts recognize, nevertheless on the theory of the questions being proper, I say they are not proper, I say they are not legal; and I now refer to Section 345-a of the Civil Practice Act, which was enacted pursuant to Chapter 880 of the 180th Session, 1957, which law became effective—

The Court: Repeat that number.

Mr. Drenzo: Chapter 880.

Motion to Strike Testimony

595

The Court: Under what section?

Mr. Drenzo: 345-a, eavesdropping evidence, inadmissible. This law became effective July 1, 1957. I would like to read this section, if your Honor pleases.

The Court: You may.

Mr. Drenzo: "Section 1. The Civil Practice Act is hereby amended by adding thereto a new section, to be Section 345-a, to read as follows:

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"345-A. Eavesdropping evidence inadmissible. Evidence obtained by any act of eavesdropping, as defined in Section 738 of the Penal Law, or by any act in violation of Section 813-b of the Code of Criminal Procedure, and evidence obtained through or resulting from information obtained by any such act, shall be inadmissible for any purpose in any civil action, proceeding or hearing;"

Mr. Scotti: Not in any criminal proceeding.

597

Mr. Drenzo: "provided, however, that any such evidence shall be admissible in any disciplinary trial or hearing or in any administrative action, proceeding or hearing conducted by or on behalf of any state, municipal or local governmental agency."

Mr. Drenzo: Now, Mr. Scotti just made an observation. He said, "Not in any criminal proceeding." Will Mr. Scotti stipulate for the record now, since he made that

Motion to Strike Testimony

statement, that the proceeding before the Joint Legislative Committee on Government Operations was or was not a criminal proceeding?

Mr. Scotti: This is absolutely irrelevant, your Honor.

The Court: I will not have any stipulation or any statement by Mr. Scotti with respect to it.

Mr. Dizenzo: Now, if your Honor pleases, why does this eavesdropping section become so important, and why do I bring it to the Court's attention, recognizing as a lawyer that it became effective July 1, 1957? It is important, if your Honor pleases, because it was before these very committee members who were sitting in the joint legislative committee on June 19, 1957, the very men who made this a statute and made it a law on July 1, 1957, these men who had already passed it and became effective at a date maybe four, five or six or seven weeks later, knowing that they were of such a mind, knowing that that that is the purpose of enacting that section, knowing that these were the same men who were hearing this testimony and voting upon whether or not this evidence should be received, and received it in evidence knowing that full well that at that very proceeding, that on July 1st it wouldn't be right, it would be illegal, inadmissible, but on June 19th it became admissible.

Arnold Bauman—for People—Redirect

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I submit for that reason, if your Honor pleases, it showed clearly and distinctly there was only one thought in mind, to target Lanza as a defendant.

For those reasons, if your Honor pleases, I respectfully move that that portion of Mr. Bauman's testimony be stricken.

I also ask your Honor to take judicial notice at this time—and I make this as a preliminary motion to the one I just made—that the proceeding before the legislative committee is not a criminal proceeding.

602

Mr. Scotti: I oppose that.

The Court: I think the proceeding before the legislative committee speaks for itself under the law and under the joint resolutions of the two houses of the legislature. With respect to your motion to strike out Mr. Bauman's testimony, it is denied.

Mr. Drenzo: I respectfully except, if your Honor pleases.

603

Redirect Examination by Mr. Scotti:

Q. Mr. Bauman, I would like to clear up a certain observation that Mr. Drenzo, I think, implied, he made in the course of his argument with respect to striking out a portion of your testimony and that is, he implies that these questions put to the witness Harry Lanza were based on all of these conversations he alluded to, conversations between Cosentino, his attorney, and

604 *Arnold Brunner for People-Redeem*

the Lanza, identifications between Mrs. Lanza and Joe Lanza, and finally conversations between Harry Lanza and Joe Lanza. Now, perhaps only for the sake of keeping the record straight and not for any legal necessity I would like to ask you this question. Were those questions that you put to this witness as found in the indictment predicated solely upon the transcript of the conversation between Joe Lanza and his brother Harry Lanza?

605

Mr. Drenzo: I submit, if your Honor please, he already answered that question.

Mr. Scott: He did not. You merely asked about three transcripts and you left it dangling in the air. I want to clear it up, at least possibly for moral if not for legal reasons.

Mr. Drenzo: May I ask for the sake of clarity. I don't object to Mr. Scott asking the question, but I ask him to take the specific questions which are enumerated in the indictment.

The Witness: That is the only way I can answer, Mr. Drenzo.

Q. The first one you conceded was not based on any transcript? A. That is my testimony.

Q. And 2, I believe you said it was partly based on the transcript, correct? A. That is.

Q. Will you be good enough to tell us what transcript you were referring to? A. In number

21

Archie Stewart for Joseph Lanza

Q11

Q. That is correct. A. The transcript of the conversation between Joseph and Harry Lanza.

Q. Let us proceed farther. The third question on page 5, on what transcript was that question based? A. I think I answered. I may be wrong too—this: that as to what third question I am not sure.

The Court: You said you did not think it was but your couldn't be sure.

The Witness: Yes.

Q12

Q. Let us read the question. Assuming that a transcript might have been used partly or in directly, would the question itself refresh your mind or your memory as to what transcript you were relying on? A. No.

Q. "Did you on that occasion tell your brother Joseph Lanza?" A. That does not refresh my recollection as to the source from which that question came.

Q. So you don't know what the source was? A. It may have been that conversation, it may have been other sources, it may have been in a number of things. I wouldn't want to speculate as to that question. I would just be speculating and I don't think I ought to do it.

Q13

Q. Was this a conversation between the lawyer and Joe Lanza? A. No, but it may have been based, Mr. Scott, on the conversation between Ellen Lanza and Joseph Lanza. I can tell you.

The Court: Was any question asked you based on any transcript or other

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Arnold Bauman—for People—Redirect

ference with a communication between any lawyer and his client?

The Witness: No. The reason I wanted to go through these one by one is that some of these questions, and this one you have asked me, number 3, may have been based on the conversation between Ellen Lanza and Joseph Lanza, wherein Ellen Lanza referred to what Harry Lanza had been doing, but none of the questions contained in this indictment was based upon, as I said before, a conversation between Sylvester Cosentino and Joseph Lanza.

611

Mr. Scotti: I want to proceed further with respect to conversations between Joe Lanza and his wife for obvious reasons, your Honor.

The Court: You may do so.

612

Q. Let me read that question under the fourth count: "Q. Did you on that occasion tell your brother 'because they wanted to speed up the thing, you know, and wanted to get a chance' and did you brother on that occasion answer, 'Yes, that's right, it's all right. Working good. You know what I mean.'?" A. That question came right out of the transcript of the conversation between Harry and Joseph Lanza.

Q. Look at the question that appears on page 7, which is part of the fifth count. I don't have to read it. Look at it. What was that exclusively based on.

Arnold Bauman—for People—Redirect

613

The Court: Wait just a moment. The witness has stated that there were other sources of information in addition to the so-called tape recordings upon which he based some of his questions. Is that correct?

The Witness: Yes, sir, but this is not such a question. This one came right out of the transcript of the conversation between Harry Lanza and Joseph Lanza.

614

Q. So this came out of that transcript? A. Yes.

Q. The conversation between Joe Lanza and his brother Harry Lanza? A. Yes, it is a quote from that transcript.

Q. And not from conversation with his wife; is that right? A. Right.

Q. Page 9, look at the question which is part of count six. Read it. A. I have read it, but I cannot at this time, without looking at the transcript of the recording between Ellen Lanza and her husband, and Harry Lanza and Joseph Lanza, tell you which transcript that came from. I cannot tell you without again comparing it with those minutes.

615

Q. Fair enough. Now, page 10, look at the question which is part of count 7. A. Again that depends on the answer to the previous question, Mr. Scotti.

Q. You don't know where it came from? A. I don't know whether Ellen Lanza told Joseph Lanza that Harry Lanza had told her or whether

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Arnold Bauman—for People—Redirect

in fact it was Harry Lanza who said that to Joseph Lanza himself. I just don't know.

Q. Page 11, look at the question there which is part of count 8. A. That one clearly came from the conversation between Harry and Joseph Lanza.

Q. Harry and Joseph? A. Yes.

617

Q. Look at the question on page 12, which is part of count 9. A. That, too, clearly came from the conversation between Harry and Joseph Lanza.

Q. Look at the question on page 14, which is part of the 10th count. A. That relates to the conversation between Joseph and Harry Lanza.

Q. Look at the question on page 16, which is part of the 11th count. A. That came from the conversation between Joseph and Harry Lanza.

618

Q. And look at the question on page 17, which is part of the 12th count. In this question you are referring to Mr. Harry Lanza, I take it, and you are asking him whether he was talking about any officer? A. Yes.

Q. What was that based on? A. I think that relates to the question on page 16.

Q. So that that would be based on what? A. On the conversation between Harry and Joseph Lanza.

Q. The question on page 18, which is part of the 13th count. A. My best recollection is that that came from the conversation between Harry and Joseph Lanza.

Q. Doesn't that really speak for itself, which would be indicative of the fact that he was having

a conversation with his brother? A. If you can characterize it. I say it is my best recollection that it did come from that conversation.

Q. Page 19, part of the 14th count. Look at the question, please. A. That clearly came from the transcript of the conversation between Joseph and Harry Lanza.

Q. Page 21, look at the question as part of the 15th count or the basis for the 15th count. A. Yes, that, too, was based upon—that was based upon the conversation between Harry and Joseph Lanza.

620

Q. Look at the question on page 22, which is the basis for the 16th count. A. That was based on the conversation between Joseph and Harry Lanza.

Q. And look at the question on page 23, which is the basis for the 17th count. A. Yes, that is based upon the conversation between Harry and Joseph Lanza.

Q. And look at the question on page 24, which is the basis for the 18th count. A. That was based on the conversation between Joseph and Harry Lanza.

621

Q. And finally, look at the last question, which is the basis for the 19th count. I believe you testified it was not based on any one of the transcripts? A. That is correct.

Q. I believe Mr. Drenzo asked you for the purpose of calling Mr. Harry Lanza as a witness before the committee. May I ask you, was it the purpose of the committee as well as yours, as Chief Counsel of the committee, to elicit from

622

Arnold Bauman—for People—Redirect

this witness testimony which your committee and you believed to be most vital and would be of great aid to the investigation that was in progress at the time, namely, that which related to a conspiracy to bribe public officers, and also to pervert the due administration of the laws of the State of New York?

623

Mr. Drenzo: I could object to the question on the ground that it is leading, but there will be no purpose in doing it, since we have two lawyers, one asking and one answering.

A. Yes. And also it might very well, and could very well—more than likely would very well serve as the basis for the introduction of legislation.

Q. In other words, in plain language by this witness, in your judgment—

624

Mr. Drenzo: That is objected to.
The Court: Overruled.

Q. By answering the questions you in good faith, as well as the committee in good faith felt he would give most valuable testimony that would be extremely helpful to the committee in its investigation concerning a possible conspiracy to commit the crime of bribery of public officers or to pervert the due administration of the laws of the State of New York; is that right?

Mr. Drenzo: Objected to.
The Court: Overruled.

Arnold Bauman—for People—Recross

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Mr. Direnzo: I respectfully except.

A. I can't think of anybody who could have given more valuable testimony than Harry Lanza.

Mr. Scotti: No further questions.

Recross Examination by Mr. Direnzo:

Q. Mr. Bauman, with reference to the interceptions between Ellen Lanza and Joseph Lanza, your investigation revealed, did it not, that Ellen was the wife of Joseph Lanza? A. I don't think there is any question about that.

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Q. And even though you knew them to be husband and wife, on or between February 5, 1957, and February 19, 1957, even though they did not permit anybody to intercept these conversations as husband and wife, you nevertheless asked questions based on the recordings made of their conversation; is that correct?

Mr. Scotti: I am going to object to this. This trial is not held for any moral evaluation. That issue has already been passed on on a writ of certiorari which was denied by the Supreme Court. I don't think this is the proper forum to raise the question of morality. That is not the issue here, whether it is morally offensive or repugnant between us. The question is, is the evidence legally admissible.

627

Mr. Direnzo: Are you through?

628

Arnold Bauman—for People—Recross

Mr. Scotti: And that has been passed on by the higher court.

Mr. Dorenzo: I submit, if your Honor, please, I am now talking about the privilege that exists between husband and wife which is described in the Civil Practice Act.

629

Mr. Scotti: Evidently you miss my point. The relationship between lawyer and client—

Mr. Dorenzo: That claim was not passed upon.

Mr. Scotti: It is an analogous point in the higher court, which ruled that even though it might be morally offensive the evidence in that case was legally admissible and the recordings were legally admissible in court.

630

Mr. Dorenzo: I want to further press the point that with reference to any conversation on any information that was gleaned on the interception of the Ellen Lanza-Joseph Lanza conversation which, because it was not authorized by either the husband or the wife, that it definitely could not be a proper question and is not a legal question.

Mr. Scotti: I make my objection, your Honor.

The Court: I will take your argument later.

Mr. Dorenzo: I have no further questions of this witness.

Mr. Scotti: No further questions of Mr. Bauman.

Mr. Drenzo: Oh, I don't think the last question was answered.

Mr. Scotti: I object to the question. Will you read the question, and I will renew my objection maybe on other grounds. It is completely irrelevant to the issue in this case, your Honor.

The Court: Read the question.

632

(The question was repeated as follows:

"Q. And even though you knew them to be husband and wife, on or between February 5, 1957, and February 19, 1957, even though they did not permit anybody to intercept these conversations as husband and wife, you nevertheless asked questions based on the recordings made of their conversation; is that correct?")

A. I, knowing that Joseph and Ellen Lanza were married, asked questions based upon the conversation or conversations recorded at the Sheriff's Westchester County Jail during the public hearings.

633

The Court: With respect to the questions set forth in the indictment, you have testified only with respect to two of them. Could there have been any question in your mind as to whether or not the information received through that interception could have been the basis for your question?

634

Motion to Dismiss Indictment

The Witness: That is absolutely right, your Honor. Am I now excused?

Mr. Scotti: No further questions. You are released.

Mr. Drenzo: No further questions.

Mr. Scotti: The People rest, your Honor.

635

Mr. Drenzo: If your Honor please, I respectfully move to dismiss each and all counts in the indictment on the ground the People have failed to establish a prima facie case as a matter of law, and on the further ground that the indictment does not state a crime.

The Court: I have ordered the minutes in this case. I haven't received them yet. I am not prepared to hear argument on the testimony taken in this case because I haven't got it before me. I have ordered it to be produced before me by the stenographers. They have not been able to catch up with it.

636

Mr. Scotti: I believe he is making what is a demurrer here.

The Court: No. Read what he said.

Mr. Scotti: Unless he is very esoteric about this. He says that the indictment fails to state a crime. That would be a demurrer in my book.

The Court: Read what he said.

Mr. Drenzo: I withdraw that portion of my motion.

The Court: Read the motion so that I can hear it.

(The record was repeated by the Stenographer.)

Mr. Scotti: With respect to the second portion, if your Honor please—

The Court: You have withdrawn the second portion, you say?

Mr. Drenzo: That is correct.

Mr. Scotti: In other words, he concedes that the allegations—

Mr. Drenzo: No, no, I don't concede it. 638

The Court: He withdraws the motion. With respect to the first motion, I am not prepared to rule on it now. I stated that I wanted the record. I haven't got it. I will hear any argument of counsel after I have the record before me and have a chance to look it over. I never saw that resolution until it was read before me from this record here. I want to take a look at it.

Mr. Scotti: In other words, we are not to argue this afternoon? I thought Mr. Drenzo was prepared to argue this afternoon. 639

Mr. Drenzo: If he wants me to I will.

The Court: What is the sense of argument to me if I am not in a position to listen intelligently to what you are talking about? We will put it over until Monday, that is all. The Stenographer said that he would have the transcript for me by 4:00 o'clock in my chambers, but I still have to look over it.

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Case

Adjourned to 11:00 o'clock on Monday.
Mr. Direnzo: Bail continued.
The Court: Yes.

(Whereupon, an adjournment was taken
to Monday, January 20, 1958, at 11:00
o'clock A.M.)

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TRIAL RESUMED

New York, January 20, 1958

Before:

HON. JOHN A. MULLEN, *J.*

Appearances: The same.

(The defendant is present with counsel.)

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(An off-the-record discussion is had at the bench, after which the following proceedings are had):

Mr. Direnzo: If your Honor pleases, with reference to the statement made by me contained in Page 43—

The Court: Of the record of this trial.

Mr. Direnzo: The record of this trial, and with reference to the demand upon Mr. Bauman to deliver the original stenographic notes of the hearing before the committee held prior to June

19, 1957, with respect to which your Honor made a direction subject to change, I now withdraw that application, and the reason for withdrawing it, if your Honor pleases, is that I make specific reference to the transcript of the minutes of the hearing held before the committee, and I will make reference to that in my motion to acquit the defendant.

Mr. Scotti: In other words, may I make this clear, your Honor? Mr. Drenzo said he is withdrawing his original request in view of the fact that the statement he wants to allude to is part of the minutes of the hearing that took place on June 19th, which has been introduced in evidence. Am I correct?

644

Mr. Drenzo: That's correct.

The Court: Introduced in evidence on this trial.

Mr. Drenzo: That's right; it is an exhibit in this trial.

Mr. Scotti: I think that clears it up.

Mr. Drenzo: Now, if your Honor pleases, I don't know whether you intended to rule on the motion that was made at the end of the People's case, before I proceed, or whether—

645

The Court: The minutes indicate that I did not rule on that motion. I did rule on it. I denied your motion.

Mr. Drenzo: I don't recall that, your Honor.

The Court: It is a double-barreled motion; first, with respect to what looked like a motion to dismiss each count on the merits and, secondly, a demurrer.

Mr. Direnzo: That's correct.

The Court: You withdrew that portion—

Mr. Direnzo: I withdrew the demurrer.

The Court: —of the motion which applied to the equivalent of a demurrer.

Mr. Direnzo: That's correct.

The Court: And you let the balance of the motion stand. With respect to that, I did deny it and I repeat the denial in all respects.

647

Mr. Direnzo: At this time, if your Honor pleases, I offer in evidence a copy of a transcript of conversation between Joseph Lanza and Mrs. Ellen Lanza, also between Joseph Lanza and Sylvester Cosentino, on February 7, 1957, at the Westchester County Jail. I might state that when I refer to it in the manner that I do, I am reading the language at the top of the first sheet and it is so designated, and I do not adopt that language as it is used in this transcript merely as a reference for descriptive purposes. I take it you have no objection?

648

Mr. Scotti: No objection.

Mr. Direnzo: I might state, if your Honor pleases, that before attempting to subpoena these transcripts this morning I spoke to Mr. Scotti and Mr. Scotti in all fairness telephoned the Joint Committee on Government Operations and arranged to get these transcripts for me, for which I am extremely grateful.

The Court: Very well, that transcript is received in evidence as Defendant's Exhibit C.

(The typewritten transcript of the conversation of February 7, 1957, referred to, is marked Defendant's Exhibit C in Evidence.)

Mr. Direnzo: May I proceed?

The Court: Yes, please do.

Mr. Direnzo: I now offer in evidence that transcript designated in the caption "Transcript of Conversation between Joseph Lanza and Mrs. Joseph Lanza on February 9, 1957, at Westchester County Jail. I offer this with the caption, reference to which I made when I offered Defendant's Exhibit C in evidence.

Mr. Scotti: No objection.

The Court: Received as Defendant's Exhibit D in evidence.

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(The typewritten transcript of the conversation of February 9, 1957, referred to, is marked Defendant's Exhibit D in Evidence.)

Mr. Direnzo: I now offer in evidence transcript of conversation between Joseph Lanza and Harry Lanza on February 13, 1957, at the Westchester County Jail, and I offer this with the same request and suggestion that I made before with reference to Exhibits C and D in evidence.

651

Mr. Scotti: No objection.

The Court: It will be received as Defendant's Exhibit E in evidence.

(The typewritten transcript of the conversation of February 13, 1957, at Westchester County Jail, referred to is marked Defendant's Exhibit E in Evidence.)

Mr. Scotti: Of course, your Honor, it is to be noted that in my registering no objection to the

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Motion to Acquit

introduction of these transcripts it should not be misconstrued as an acknowledgment of their being relevant to the issues in this trial. I have always consistently maintained that they are not relevant or material to the issues in this case.

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The Court: I have accepted them in evidence because obviously the questions as set forth in the indictment which are the subjects of the various counts in the indictment, as testified to by Mr. Bauman, did come from some source and these are the sources from which those questions came. That is my recollection of his testimony.

Mr. Drenzo: Now, if your Honor pleases, the defendant rests.

Mr. Scotti: The People rested originally.

Mr. Drenzo: Now, may I proceed with my motion?

The Court: Yes.

654

Mr. Drenzo: May it please the Court, I move to acquit the defendant on the ground that the People have failed to establish his guilt of the crime charged beyond a reasonable doubt. The defendant, if your Honor pleases, is charged in a 19-count indictment with an indictable misdemeanor, that is, a violation of Section 1330 of the Penal Law. Section 1330 reads as follows:

"A person who being present before either house of the legislature, or any committee thereof authorized to summon witnesses, wilfully refuses to be sworn or affirm or to answer any material or proper question, or to produce upon reasonable notice any material and proper books,

papers or documents in his possession or under his control, is guilty of a misdemeanor."

What does the People's case consist of? They called three witnesses—Arnold Bauman, counsel for the Joint Legislative Committee; Leon Zuck, the reporter or stenographer who took the stenographic notes and recorded the questions propounded to the various witnesses and their answers, which are reflected in the exhibits offered in evidence, and they called upon special investigator William Devine to establish the service of a notice upon the Attorney General of the State of New York, Mr. Hogan, the District Attorney of the County of New York, and Mr. Gagliardi, the District Attorney of Westchester County.

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For further support of the proof required or necessary to establish a violation by this defendant of Section 1330, they introduced into evidence, and there were received in evidence, copies of the New York Legislative Index for the years 1955, 1956 and 1957; they introduced a transcript of the June 19, 1957, hearing; they introduced the original stenotype notes of Mr. Zuck and the notices which were served upon the Attorney General and the District Attorneys.

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Now, let us examine the essentials and the requirements which are necessary to constitute the crime charged against this defendant.

One, he must be present before a committee of the legislature;

Two, he must wilfully refuse to be sworn;

Three, he must wilfully refuse to answer;

And, four, the answers which he wilfully refuses to give must be material and proper.

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I am going to concern myself with only 3 and 4, to wit, that he must wilfully refuse to answer and that the questions which he wilfully refuses to answer are material and proper to the inquiry.

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Now, I say is there proof that Harry Lanza, the defendant in this case, wilfully refused to answer? And I say the answer is No, he did not wilfully refuse to answer. Section 1330 is a substantive statute and it sets forth specifically what is necessary to constitute a crime. If a crime was committed at all, where was this crime committed? The crime of necessity would have to be committed on June 19, 1957, at the Bar Association of the City of New York before a duly authorized and constituted committee of the legislature.

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Now, his guilt would have to be established beyond a reasonable doubt and I submit that the People have failed to establish that burden and I am going to attempt to convince the Court that the prosecution has failed, and I am going to take the very language of the complainants in this case, the legislative committee or members thereof.

I am now reading from People's Exhibit 4 in evidence, if your Honor pleases, Page 1883.

The Court: Of the hearing before the—

Mr. Direnzo: Of the hearing before the Joint Legislative Committee:

(Reading) "Assemblyman Corso: Mr. Chairman, the witness having refused to testify before this Joint Committee, this Joint Legislative Committee on Government Operations, as directed and

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ordered, I move that this matter be referred to the District Attorney of New York County for appropriate action by him and that the record of minutes of these proceedings be delivered to the District Attorney of New York County.

"The Chairman: The motion by Mr. Corso, do I hear a second?

"Senator Greenberg: Second.

"The Chairman: Seconded by Senator Green- 662
berg. Any discussion?

"(No response.)

"The Chairman: The Secretary will call the roll on this motion.

"Assemblyman Corso: Senator Zaretzki.

"Senator Zaretzki: Aye.

"Assemblyman Corso: Senator Greenberg.

"Senator Greenberg: Aye.

"Assemblyman Corso: Senator McGahan.

"Senator McGahan: Aye.

"Assemblyman Corso: Assemblyman Carlino.

"Assemblyman Carlino: Aye. 663

"Assemblyman Corso: Assemblyman Bannigan.

"Assemblyman Bannigan: Aye.

"Assemblyman Corso: Assemblyman Horan.

"Assemblyman Horan: Aye.

"Assemblyman Corso: Aye.

"Mr. Chairman: The motion is unanimously carried.

"Mr. Drenzo: I take it that this also is under 1330 of the Penal Law?

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"Mr. Chairman: All afternoon, Mr. Direnzo, you have been asking me to interpret the law and give you the sections and all of that. I'm sure you don't need advice on what—

"Mr. Direnzo (interposing): I think it is important here because that's the observation I heard Senator Zaretzki make at the termination of the testimony.

665

"The Chairman (interposing): Any observation by Senator Zaretzki is not only important but needs no further explanation.

"Mr. Direnzo: I take it it is on the same basis, is that correct?"

Now, if your Honor pleases, when this motion was made it was made by a lawyer; it was made by one of our legislators. When the motion was made by him and discussion was asked for, there were lawyers on the committee; all but one, if I remember the testimony of Mr. Bauman correctly, were lawyers, and we as lawyers know—and the Court recognizes the fact—that many times we are called upon to determine what a statute means and invariably we ask the question, What is the legislative intent?

666

Now, here is a man, a witness before the committee, who has been asked questions before the committee and who took a stated position before that committee with reference to his rights. There is no doubt that they had a possible violation of 1330 in their minds because this was for reference to the District Attorney. Any other action, I take it, would be appropriately advanced in the Su-

preme Court if they contemplated a violation under the legislative law or one of the other appropriate remedies available to them. I assure you that it would not have been in this court. So they had 1330 in mind.

Now, recognizing that they are lawyers, recognizing that they were familiar with 1330, do we find from the complainants in this case a single word about whether the refusal by this witness was a wilfull refusal? They themselves only call it a "refusal"—all lawyers on a committee comprised of whom? The majority leader in the Senate, the majority leader in the Assembly, the minority leader in the Assembly, the minority leader in the Senate. These are the men who make our laws and I say that they are charged with a greater degree of accuracy, they are charged with a greater degree of responsibility, especially when it comes to leveling a charge at a defendant. I submit that that in and of itself, not to mention the other points that I am about to raise, creates a reasonable doubt. This is a criminal statute. It must be strictly construed and applying both of those tests I state, if your Honor pleases, that a reasonable doubt exists on that point alone.

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Now, on the question of wilfullness again, if your Honor pleases, much has been made of the fact that the witness, in asserting his privilege under the Constitution against testifying to anything which answer might tend to incriminate him, added to it, "I do so also on the advice of counsel," in words or substance that's what he said,

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and much has been said on the subject that the mere fact that a lawyer gives his client advice doesn't absolve the client. I want to follow that thought to establish again that the People have failed to prove the guilt of the defendant, beyond a reasonable doubt.

671

What is the issue, or what was the issue with reference to the position taken by this defendant before that committee? He said, in words or substance, "You cannot give me adequate protection. I am clothed with the protection afforded me under the Constitution. You have not given me adequate protection and without sufficient and adequate protection I refuse to answer." Now, he has sitting alongside of him, if your Honor pleases, a lawyer. The lawyer counsels and advises. Is the client entitled to advice? He surely is. What does the presence of that lawyer before a legislative committee mean? That he just sits there alongside of the witness to hold his hand? Surely that is not the thought. Why, in the New

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York State Legislative Annual of 1954 we find the Governor's memoranda on bills which were approved and specifically reading under the heading "Investigations—legislative, executive," this is the language of Governor Dewey:

"Two years ago we blazed a new trail"—incidentally it was spelled wrong in the report, your Honor—"in protecting the rights of the individual from abuses by investigating committees. We forbade the exploitation of witnesses by forcing them to be examined before television, motion picture and radio microphones, with batteries

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of cameras and glaring lights. Our purpose was to preserve the basic rights of the witness to have a fair opportunity to present his testimony. This year we have again led the nation in the fight for the rights of the individual. These bills carry out the recommendations in my annual message for a code of fair procedure governing the conduct of legislative and executive investigations. The code is the first of its kind in the nation and represents a major contribution to American government, embodying in our civil rights law fundamental requisites for fairness in the conduct of investigations."

674

The first recommendation is with reference to notice of proceedings, and the second recommendation reads as follows:

"A witness is given the express right to be accompanied and advised by counsel at public and private hearings."

Now, if your Honor pleases, that in itself is some indication that the advice or counsel given a witness must mean something, but more important than that, a lawyer just can't sit back and arbitrarily say "Don't you answer," and then the witness seek to protect himself by the fact of saying "My lawyer told me not to answer; I was protected." Well, I could think of many, many lawyers who might not be too ethical, who might not care too much about giving a client advice convenient to suit the client.

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If your Honor pleases, what do we find here?

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Has there been anywhere an adjudication, an authoritative adjudication as to whether or not this joint committee that we are talking about, this joint committee that was responsible for the indictment of this man—where do we find any evidence that this issue has ever been adjudicated or resolved by competent authority? I say it has never been and the point has been consistently raised that this committee had limited power of immunity; and when the witness was asked the question and he asserted the privilege, he stated in crystal clear language, “I have limited immunity.”

677

Why is that important? It’s important because in order to establish a violation and the commission of a crime under 1330, that the witness wilfully refuse. Now, what does this word “wilfull” mean? Can you just omit it? Can you just say he refused to testify, consequently convict him, guilty? It does not mean that at all. Let us examine, if your Honor pleases, some of the cases.

678

There is, frankly, not too much law to be found under 1330.

We find one case in McKinney’s—The People against Foster. I followed that case and it has been cited a number of times and I’d like to make reference to the Foster case, reported at 198 New York Supplement at Page 11:

“It is true the trial judge did submit to the jury whether the proper time was given to him to consult counsel, and that was the only question which was, in fact, submitted to the jury—the question of consulting counsel. The witness stated

that he would like 24 hours to consult counsel. The committee adjourned for lunch for one and a half hours, at which time he made no attempt to consult counsel. That fact was submitted to the jury for their determination of the question whether proper time was given him to consult counsel."

In the trial of a criminal case all questions of fact are exclusively for the jury to determine. I ask your Honor to consider that factor and determine whether or not this defendant was wilful.

680

The Court: There is no contention here that the defendant did not have adequate time to consult counsel.

Mr. Dizenzo: That question is absolutely out. The defendant had adequate time. I want the record to be crystal clear on that score, if your Honor pleases. There is strictly a legal proposition in this case and I am meeting it as such.

Now, there is another case I'd like to invite the Court's attention to and that is *Wass* against *Stephens*, reported in 128 New York, 123. In that case, at Page 128, if your Honor pleases, the Court explaining the word "wilfully" starts off with this language: "'Wilfully' in the statute means something more than a voluntary act, and more also than an intentional act which in fact is wrongful"—and I am not conceding, frankly, your Honor, that the conduct was wrongful on the part of Harry Lanza in this case; I am only quoting the language of the *Wass* case—(continuing to quote) "It includes the idea of an act intentionally done with a wrongful purpose, or with

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a design to injure another, or one committed out of mere wantonness or lawlessness.”

Then we find *People against Solomon*. That was a contempt case decided by Judge Freschi. Referring to the *Foster* case, Judge Freschi said as follows:

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“In *People against Foster*, 204 App. Div., at 295, Page 300, 198 N. Y. S., 7, at Page 11, affirmed 236 N. Y., 610, where the wilfull refusal to produce certain documents before a joint legislative committee, in violation of Section 1330 of the Penal Law, was considered the Court said:—quoting the language in *Wass against Stevens*, the case just cited to your Honor: ‘The word “wilfully” means something more than a voluntary act, and more also than an intentional act which in fact is wrongful. It includes the idea of an act intentionally done with a wrongful purpose, or with a design to injure another, or one committed out of mere wantonness or lawlessness.’”

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In *Hewitt against Newburger*, 141 N. Y., 538, it cites with approval *People against Foster*.

In *People against Baylinson*, 211 Appellate Division, at Page 40, we find the following language: “Wilfulness implies an intent on the part of the wrongdoer. There is not the slightest evidence in the case that the defendant acted wilfully or with wrongful intent.”

The absence of proof of any wilfull intent on the part of the defendant absolves him from guilt—citing *People against Foster*, *People against Marrin* and *People against Martinitis*.

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In *Potter against the United States*, 155 United States, 438, the United States Supreme Court held that an officer of a national bank could not be convicted for wilfully certifying a check drawn against insufficient funds, unless the officer of the bank intended to do wrong. The Court in this case, at Page 446-447, said: "The word 'wilful' is omitted from the description of offenses in the latter part of this section. Its presence in the first cannot be regarded as mere surplusage, it means something. It implies on the part of the officer knowledge to do wrong." That only concerns itself with the presence of the word "wilful" in that statute.

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I say we have to establish wilfullness and establish it beyond a reasonable doubt before we can say that defendant is guilty, and I say they have failed in the proof of that facet, if your Honor please.

Now, there is no doubt that we challenged the extent of the committee's immunity powers and to make that crystal clear, if your Honor please, I want to read from People's Exhibit 4 in evidence, beginning at Page 1865 and going to 1870:

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"Mr. Drenzo: Again I make reference to a statement made on June 19, 1957, before the committee. I take it that this notice is directed to the Attorney General of the State of New York, Louis J. Lefkowitz; Frank S. Hogan, District Attorney of New York County, and Joseph F. Gagliardi, District Attorney of Westchester County. This

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is with reference to the notice served under 2447. I take it that no notice was sent to the District Attorneys of any other counties, is that correct, Mr. Chairman?

"No response.

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"Mr. Direnzo: Now, I take it also from a reading of the notice that this was the notice that was required under Section 2447. Now, I take it also that Section 2—the alleged grant of immunity here is by Sections 584 and 381 of the Penal Law within Section 2447 insofar as it refers to a positive statute or section whereby immunity can be granted, those sections which we commonly refer to as bath sections, is that correct, Mr. Chairman?

690

"The Chairman: Maybe I'd better make the statement that I made before; I think that explains the situation and I will make it for the benefit of this witness at this time. This committee has been investigating the facts and circumstances which led to Joseph Lanza's arrest for the violation of parole on February 5th, 1957, and his restoration to parole on February 19, 1957, in connection with this matter. The committee has been and is still seeking to determine whether any persons conspired to commit acts calculated to pervert or obstruct justice or the due administration of the laws, whether any persons conspired to commit a crime, whether any person gave or offered a bribe or caused a bribe to be given or offered to a public officer.

"Mr. Direnzo: In effect you are reading, are

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you not, a provision, or a portion of 589 of the conspiracy statute?—

“The Chairman (interposing): I am reading, Mr. Drenzo, that which I read.

“Mr. Drenzo: All right, Mr. Chairman.

“Mr. Bauman: Pardon me a minute, Mr. Drenzo. Mr. Chairman, I think the circumstances here are perfectly clear. This committee has been conducting, is conducting an inquiry into the facts and circumstances relating to the restoration of parole to Joseph Lanza. We are conducting an inquiry to ascertain whether or not there was any bribery or corruption or a conspiracy. That, I think, has been clear to everybody.

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“Mr. Drenzo: When this notice which is received as Exhibit 1 was received in evidence or as a committee exhibit, I had no opportunity to object to its introduction into evidence. Right. I now have it and I take it.

“The Chairman: You attempted while we were examining another witness to urge an objection and I told you at the time that when your clients were called you would have an opportunity to urge any objections that you have to this notice. If you want us to go through the motions of re-introducing it, we will do so.

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“Mr. Drenzo: For the sake of saving time might I suggest that I repeat and I reiterate with the same full force and effect all of the objections made by Mr. Arnold Roseman on behalf of the previous witness with reference to the introduc-

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tion of this instrument, which has been received as Exhibit 1 today.

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"I also repeat and reiterate with the same full force and effect all objections he made relative to the purpose of the inquiry, the materiality of the questions propounded, the question of the jurisdiction of the committee, the question of the attendance of the full committee the question of whether a majority of the committee is present here and I recognize that I will probably get the same rulings and I want to note the same objections that he did.

"The Chairman: Unless there is some change on the part of the committee, you will get the same ruling.

"Mr. Direnzo: Fair enough.

"Senator Greenberg: What is the ruling, Mr. Chairman?

"The Chairman: You are overruled.

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"Senator Greenberg: May we proceed, Mr. Chairman?

"Q. Mr. Lanza, please tell the committee the name of anybody with whom you spoke during the month of February 1957, about the restoration to parole of your brother Joseph Lanza? A. I refuse to answer.

"The Chairman: On the same grounds?

"The Witness: The same ground.

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"The Chairman: And the committee directs you to answer.

"The Witness: I didn't hear you.

"The Chairman: The committee directs you to answer.

"The Witness: I refuse to answer on advice of counsel and also on the other ground.

"Mr. Bauman: I have no further questions.

"The Chairman: Well, now, wait a minute. 698
Are you now refusing to answer just on the advice of counsel or are you refusing to answer on the ground that your answer will tend to incriminate you?

"The Witness: Both.

"The Chairman: Because I have hesitated, out of regard to the dignity of the legal profession, to make this comment before, but I think all of us lawyers up here will agree that an objection on the ground of advice of counsel is not a legally tenable objection.

"Mr. Drenzo: Under the circumstances, I might differ with the committee chairman. 699

"The Chairman: It might be an explanation but it is not an objection.

"Mr. Drenzo: I think under the circumstances it is absolutely necessary.

"The Chairman: You say that that is a valid objection, that he may object here, before this committee, to any question asked of him on the ground just on advice of counsel?

"Mr. Drenzo: No, on the ground that there seems to be a very, very serious question here as

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to whether you can, this committee can, properly clothe the witness with immunity and counsel is of the firm conviction and understanding that you cannot,—and under those circumstances he has so advised his client and under the circumstances, I think the client, recognizing that he is represented by counsel, counsel feels that he doesn't have to answer those questions, only because he doesn't have a full and proper and adequate grant of immunity should state that he is doing it to show a lack of wilfullness on his part."

Then down toward the bottom of the page, if your Honor pleases:

"Mr. Direnzo: May I ask the Chairman one question?

"Suppose this committee is in error about the immunity? Where does the witness stand?"

702

This is the Chairman of the complaining committee, if your Honor pleases, of whom I asked that question.

"Suppose this committee is in error about the immunity? Where does the witness stand?" and this is the answer I get from the Chairman of the joint committee:

"The Chairman: Mr. Direnzo, if you want to argue the law with me, it might be very elevating to you, but we will select another time. Let us proceed."

Now, if your Honor pleases, does this constitute wilfullness? Were we asking him to show

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us why they gave a full and complete grant? I submit they never did and I'll get into that further and I'll establish that all they were ever giving anybody was limited immunity, and not complete immunity as is required by the statute.

Again on this question of immunity, I am now reading from 1841. I think this is a different exhibit. That's the Georgiano testimony; we have an exact transcript of it.

704

The Court: I think it is Exhibit 6. Is it 6?

Mr. Direnzo: At any rate, the transcript is in evidence. I personally read it into evidence.

At 1821, if your Honor pleases, this appears:

"Mr. Roseman:"—I want the record to show, if your Honor pleases, that all objections—

The Court: You adopted all the objections made by Mr. Roseman in behalf of his client.

Mr. Direnzo (reading): "Mr. Roseman: May I also at this time state for the record that in the counsel's mind is a question of the power of this committee to direct this witness to answer that question and the question preceding on the ground that the committee itself, through its counsel and through its members, stated to the Governor of the State of New York that it did not have the power of granting immunity and sought such power, and upon the ground that since this committee on that basis—or, rather, that there is a question of whether or not it has the power, that it cannot direct the witness to answer under the penalty of committing contempt. For that reason I want to state for the record this witness'

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legal contention and, as we all know, that in order to destroy the privilege against self-incrimination the power to grant immunity must be as broad as the destruction of the privilege.

"The Chairman: First of all, any statement of opinion as to the law by any member or members of this committee does not have the effect of making that the law."

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The Court: And I say "Amen" to that.

Mr. Drenzo: Well, if your Honor pleases, it's all right to say "Amen" to it but these committee members are the complainants and if they have a doubt, where does the witness stand? Can we say that the witness is acting wilfully when the members of the same committee are in doubt, and it seems to be conceded by the Chairman from that very statement.

708

The Court: I think you will find in that record further the Chairman said they had no doubt whatsoever as to this grant of immunity. It was only with respect to possible additional powers which they were seeking.

Mr. Drenzo: I am going to read that in and then I want to argue that position also, if your Honor pleases. I don't believe there has been any doubt in the mind of any member of this committee that in the investigation of certain matters as specifically set forth in the Penal Law, the committee did have the power to grant immunity. The question that arose was as to whether, if the committee broadened the scope of its inquiry, that power would then rest in the com-

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mittee. I think you will particularly note in the statement which I made that this committee is directing its attention now to certain specific possible violations of the Penal Law and I don't believe there has ever been any question in anybody's mind that in pursuing an inquiry as to those particular matters the committee does have the power to grant immunity.

(Reading) Senator Zaretsky: The Chairman has told you in this statement that the charge here is conspiracy or bribery and corruption. The inquiry is as to those two branches and as to those sections, 381 of the Penal Law and Section 584 specifically give to this committee the power to grant immunity in this Lanza inquiry and we have all the power that we need in this inquiry. The point that you raise as to the request for future powers made by the committee to the Governor has nothing to do with this inquiry whatsoever and was directed to any possible future inquiry in other cases or matters which may arise. There is nothing before the committee now. It is just supposititious. As to those future inquiries in other unrelated matters the committee said perhaps we might need greater power. As to this inquiry there is no question in anybody's mind that we have full and complete powers and always had.

"Mr. Roseman: I'm sorry, Senator, I must respectfully disagree with your legal contention."

Now, if your Honor pleases, when Senator Zaretsky spoke about 381 and 584 what specifically

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was he talking about? If we examine those sections, what do we find? We find that they constitute what we commonly call "bath" sections, immunity sections. Immunity for what? Immunity for those crimes—for conspiracy and for bribery.

Another significant point is you have the witness Lanza—

The Court: I think you are mistaken there.

Mr. Direnzo: On the question of the law?

713

The Court: Yes, on the limitation of 381 and 584. With respect to those particular sections I think you will find broader immunity.

Mr. Direnzo: I don't think the immunity, in any event, is sufficiently broad and I want to be heard further on it, if your Honor pleases. Here is a witness, Harry Lanza, the defendant in this case, who appeared before the committee not on one occasion but he appeared and gave testimony before the sub-committee and then two full committees after that—on three occasions. Isn't it peculiar that although he was asked the same questions or substantially the same questions on each of these occasions, he never got this grant of immunity? And isn't it also peculiar—

714

The Court: Just a moment. When you say he never got this grant of immunity, what do you mean by that?

Mr. Direnzo: This alleged grant of immunity. If they thought they had it, why didn't they give it to him on the first occasion? Why didn't they give it to him on the second occasion and why between the second and third occasions did they find it necessary to go to Albany, to go to the

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Governor; and when they returned after having had a memo all the time from District Attorney Hogan and District Attorney Silver showing that in the opinion of Mr. Hogan and in the opinion of Mr. Silver they had the power, nevertheless they found it necessary to go to Albany and on their return they then decided to give this man this alleged grant of immunity.

The Court: They gave their reasons for going to Albany, but I think you will find in the record of this trial that the defendant was advised that the committee did have the full power to properly clothe him with immunity and therefore they directed him to answer questions. I think that's in the record.

716

Mr. Dorenzo: Yes, but they did that on the third occasion. If they felt that they had adequate powers, they could have given him this grant before going to Albany. Why didn't they give it to him? They asked him the same questions and directed him to answer. They followed the same pattern on each of those occasions. I point that out, your Honor, only because I, as counsel for this man, say that the committee was in doubt; they don't know. How can I tell you if you ask me in essence, "Do I have immunity?" I can't say that you do and under the circumstances I have to say that you don't, because this committee, who is the complainant in this case, is in doubt.

717

The Court: Unless I am in error in my recollection, Mr. Dorenzo, the committee before asking any questions that were made the subjects of any count in the indictment advised the defendant that

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they had full and complete power to grant complete immunity.

Mr. Drenzo: I don't know that to be the fact.

The Court: The record here is barren of any statement or knowledge of how or why they went to Albany except there is some reference to it.

719

Mr. Drenzo: As a matter of fact, I don't think you will find anywhere prior to June 19th, and I am not going to say this authoritatively because I may be in error—I don't think I am in error—a scintilla of evidence prior to June 19th with reference to the witness Harry Lanza indicating that the committee felt that it had adequate immunity power.

The Court: The record shows that on June 19th, the chairman so advised the witness.

Mr. Drenzo: That's on the main appearance. I am talking about any appearances before that time. I am urging that as an argument to indicate that this committee didn't feel that it had adequate immunity powers.

720

Mr. Scotti: I don't want to interrupt this argument but I object to this allusion, first, on the legal ground that the basis for this allusion is not part of the evidence. If your Honor recalls, I interposed an objection to that question put by Mr. Drenzo to Mr. Bauman concerning the attitude of the committee prior to June 19th on the ground that their attitude prior to the 19th was completely irrelevant and immaterial to this issue, and your Honor sustained my objection.

The Court: Yes.

Mr. Drenzo: That's correct.

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The Court: And, Mr. Direnzo, you cannot get away from the fact that when you raised the question before that they did advise you that they felt they had complete power of granting immunity.

Mr. Direnzo: But, if your Honor pleases, their advice isn't authoritative as far as I am concerned. Mr. Bauman, acting for them—

The Court: You can't blow hot and cold.

Mr. Direnzo: Well, no. I say first they don't have it. I am taking that position right now.

722

The Court: You have made the statement, as part of your argument, that they were all lawyers with the exception of one who were sitting on that committee--

Mr. Direnzo: That's right.

The Court: —and you called upon them as authorities for that which you deny them as authorities.

Mr. Direnzo: I cite them as authorities on the question of fact in drafting this resolution. That's a question of fact, not one of law, when they in couching the language of this resolution vote that the matter be referred to the District Attorney and charge Lanza with a refusal to testify, not with a wilfull refusal to testify. To that extent I say as lawyers in framing that resolution if they knew it was wilfull refusal, they would have called it a wilfull refusal, but since they didn't, there is a reasonable doubt.

723

The Court: What is the relevancy of any complainant's view toward the legal conclusion to be arrived at when the District Attorney presents a matter to a Grand Jury? I know of none.

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Mr. Direnzo: The relevancy of it, if your Honor Pleases—and I may be in error, but I don't think I am—the relevancy of it is this, that this alleged crime was committed before the committee and it has had a wilfull refusal before that committee. Now, if it was not a wilfull refusal before that committee, and if they did not recognize it as a wilfull refusal but only a refusal, no crime was consummated.

725

The Court: Just a minute. The committee does not make that determination. That is a matter of fact which a jury or a Court must determine, not the committee.

Mr. Direnzo: But the refusal must be wilfull before that committee.

The Court: Yes.

Mr. Direnzo: And I state if they didn't recite that in the accusation or in the motion, that is some indication that they didn't regard it as wilfull, and being lawyers they would be more careful to include that finding in the proposition or in the proposal.

726

The Court: The Grand Jury apparently did by this indictment, and the Grand Jury is the one that charges people with crimes in this county.

Mr. Direnzo: Now, if your Honor pleases, my argument is drawing to a close and I'd like to refer respectfully to the case of Dayton Bronze Bearing Company against Gilligan, a Circuit Court of Appeals case in the Sixth Circuit—

The Court: What is the citation on it?

Mr. Direnzo: I'll give it to you; I don't have it here. It was decided June 6th, 1922.

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The Court: Read it.

Mr. Drenzo (reading): "Where a corporation, believing in good faith, on reasonable grounds, after taking advice of reputable counsel, that it was not liable for munitions tax, made no return within the time prescribed by statute, but later, on advice of the collector, made a voluntary return without prejudice, the imposition of the penalty for failure to make timely return, prescribed by Revised Statute 3176, held not authorized."

There is one further ground, if your Honor pleases, that I urge for the acquittal of this defendant.

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The Court: Yes.

Mr. Drenzo: If we follow the 19 counts in the indictment, what do we find? In the normal course of events if a District Attorney has a witness before a Grand Jury, he will ask the witness, "What did you say to So-and-So and what did So-and-So say to you?" and his big problem usually is to find out what was said between these two individuals. Is that the problem in this case? That is not the problem at all. The District Attorney and the committee know what was said. Those transcripts which are in evidence, the monitored conversations—

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The Court: They are not in evidence.

Mr. Drenzo: Well, yes.

The Court: They are now in evidence here at your request.

Mr. Drenzo: Yes.

The Court: Only for clarification purposes.

Mr. Drenzo: Yes, they are in evidence. The District Attorney knows—

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The Court: They were not in evidence before the Grand Jury. We will take judicial notice of that.

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Mr. Direnzo: I have to presume that they weren't but it is obvious that they knew pretty much what was contained in them from the questions that were asked. We find ourselves here on the proposition of its being a proper question and whether it is a legal question. They knew the entire conversation; they had all of these taps. In effect, what do they want to know about them? Suppose the question were asked, "What did you mean by so-and-so?" That would be an objectionable question; it would call for the operation of the witness' mind, it would call for a conclusion and if an objection like that were made, I think your Honor would sustain it.

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In the next question you have the same information: "Whom did you mean and what did you mean?" Again you are asking a man to tell you what he had in his mind. I am not so sure that that is a proper and legal question within the requirements of 1330. For the first time, as I understand it, we have a situation where you don't just want to know what happened; you want to know what these things mean and that calls for the operation of a witness' mind, and I say that's highly improper.

Now, with reference to the other argument I advanced for the exclusion of Arnold Bauman's testimony concerning the evesdropping statute, only on the question of determining whether the question was proper in light of the fact that these same men who are partially responsible for the

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adoption of the new law that went into effect on July 1st, 1957—

The Court: That was the Civil Practice Act?

Mr. Drenzo: The Civil Practice Act, yes, your Honor. I submit that the proceeding before the legislative committee was a civil proceeding. That was no criminal proceeding.

The Court: Remember that the proceeding referred to which led to the enactment of that Civil Practice Act amendment concerned and limited the use of evesdropping evidence to civil cases,—

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Mr. Drenzo: That's right.

The Court: —and by implication left it open for use in criminal cases.

Mr. Drenzo: But I submit that the proceeding before the legislative committee was a civil proceeding; it was not a criminal proceeding.

The Court: No.

Mr. Drenzo: And on the question of it being a proper question, I say that it could not be proper, especially when the same men who are responsible for the enactment of the law sit on the dais and permit that type of testimony to come in. I am going to ask your Honor to consider the argument which I have made to exclude Arnold Bauman's testimony as additional argument in support of my motion to acquit the defendant.

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The Court: I shall. One other thing I want to clear up on the record of this argument is that those tape recordings of different interceptions of communications in the Westchester County Jail would never have been permitted in evidence on this trial by me had they been offered by the

District Attorney, because they have not yet been properly identified. I accepted them only because you as defense counsel offered them in clarification of the questions and to show that the questions undoubtedly arose from some information supplied through that sort of what we might call eavesdropping.

Mr. Drenzo: My reason for offering them in evidence was because Mr. Bauman did not concede that all of the questions which he propounded to the witness he gathered as material from these tapes. That was the reason.

The Court: He said two or three of them he did not.

Mr. Drenzo: That is my argument, your Honor.

The Court: I just want the record to show that I have never yet had those tape recordings properly identified in such a manner—

Mr. Drenzo: Can we stipulate for the record now, so there will be no question about it? I think Mr. Scotti will concede that the tape recordings were recordings of the conversations between Joseph Lanza and his wife, Ellen Lanza, and between Joseph Lanza and Sylvester Cosentino.

The Court: No, I won't take any stipulation of that sort on that type of evidence. I have accepted it on your statement because, as you say, Mr. Bauman did testify that there were two or three questions there which did not spring from information gathered from the tapes.

Mr. Drenzo: Right. That's the only purpose for which I offered them.

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The Court: But in all fairness I must say that I would not have permitted them in evidence had they been offered without further identification.

Mr. Drenzo: All right.

Mr. Scotti: Your Honor, the People vigorously oppose this motion for an acquittal interposed by the defendant through his counsel, Mr. Drenzo. It is completely without merit, your Honor. I think there is no question that the evidence adduced in this trial overwhelmingly establishes the guilt of this defendant in respect to Section 1330 of the Penal Law.

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Before I proceed to address myself to arguments raised by Mr. Drenzo I would like, for the sake of orderliness, state briefly the salient facts that made possible this indictment which has been tried before your Honor.

As your Honor knows, since it was introduced in evidence, on April 2nd, 1955, the Legislature of the State of New York by concurrent resolution of the Senate and Assembly created a Joint Legislative Committee on Government Operations, with full authority to investigate the management and affairs of any agency of the State government in order to aid the Legislature in consideration and enactment of necessary remedial legislation. Included within this authority was the power to inquire into improper and corrupt practices in the operation of any State agency or in the administration of any State law, and to this end the Joint Committee was authorized to call hearings, summon witnesses and take testimony. I believe the latter part was added in

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1956, when the 1955 resolution was re-adopted by both the Senate and the Assembly.

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I'd like to allude specifically to the second provision of the 1955 resolution as adopted by both the Senate and the Assembly: the administration of State laws and the detection and prevention of unsound, improper and corrupt practices in connection therewith. Sometime in March, 1957, as Mr. Bauman testified, the Joint Legislative Committee created by this resolution to which I made reference conducted or initiated an investigation into the circumstances relating to the arrest of one Joseph Lanza for violation of parole on February 5, 1957, and particularly his restoration to parole on February 19, 1957, in order to determine whether there was in existence a conspiracy to obstruct the administration of justice and to pervert the due administration of the laws of the State of New York and also to commit the crime of bribery of a public official—in this case public officials attached to the State Division of Parole and possibly other public officials.

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In the course of this investigation the committee called for the appearance of the defendant Harry Lanza as a witness before it on June 19, 1957, in the County of New York. Mr. Bauman testified with respect to that rather fully, your Honor, and it is obvious from the testimony given by Mr. Bauman that the committee was very anxious to elicit from the witness Harry Lanza testimony that would be of considerable value to the committee in its investigation of the conspiracy which I described previously.

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At this point I would like to stress that the investigation initiated by the committee in March, 1957, which prompted the committee to call the defendant Harry Lanza before it was a witness, was completely within the scope of the powers vested in such committee by the resolution re-adopted in 1957. I don't think there is any debate about that. I say with all due respect to the Court it is not necessary for me to belabor that point, but as I said before I would like to make mention of the salient facts which I believe are quite essential to present for the Court's determination of the issue of guilt or innocence of this defendant.

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Now, I would like to allude to the argument made by Mr. Drenzo, at least one of them at this time. He says that his client, Harry Lanza, did not wilfully refuse to answer, and I agree that one of the elements that make up the crime which constitutes a violation of Section 1330 is wilfulness, the wilfull refusal to answer questions put to a witness by the committee, and he seeks to bolster his contention that the refusal was not wilfull by alluding to the fact that the committee in its resolution referring the matter to the District Attorney's office omitted the characterization of the refusal as a "wilfull" one, if you recall, your Honor. Without any intention on my part to reflect upon the competence of my adversary, as he is a highly competent lawyer, a very able one, very astute and very resourceful, nevertheless I must point out that it is elementary to any lawyer that the District Attorney of the

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County of New York need not wait for an expression of an opinion from this committee as to whether a crime was committed. I go further: Assuming that the legislative committee had refrained from offering this resolution in which they referred the matter to the District Attorney's office, and assuming further that the legislative committee had turned its back and displayed an attitude of complacency, of indifference. Nevertheless that doesn't alter the basic fact that a violation of Section 1330 had been committed.

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The test is not whether the committee believes a crime was committed. The test is whether the conduct of this witness before that committee did constitute a violation of Section 1330. It was the facts that prompted us to take action and present this matter to a Grand Jury. With all due respect to the members of this committee, for whom I have a regard with respect to their legal acumen, and with no intention on my part to reflect on their legal knowledge or competence, I must say that

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there was no obligation on the District Attorney or the Grand Jury to be guided by an expression of opinion or an evaluation by this committee. So that that is completely irrelevant to this proceeding and does not bear on the matter of wilfulness.

Then he says, in order to further sustain his contention that the refusal was not wilful, that his client did so on his advice. Again I hope that my reference to this particular point is not misconstrued as any reflection upon Mr. Dorenzo's competence as an attorney, but I must say that the advice given by Mr. Dorenzo or by any at-

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torney does not constitute a justification for a refusal to answer questions before this committee, your Honor. That is a risk that a witness takes in a proceeding of this kind. He cannot hide his unwillingness to testify behind any legalistic advice furnished him by his counsel. If that were the criterion as to whether a refusal was wilful, your Honor can see how a law of this kind could be reduced to an utter nullity, merely by recourse to an erroneous or specious advice given by an attorney. Of course I don't mean Mr. Drenzo in this case and I am not impugning his good faith, and I think he knows that.

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So, your Honor, I say that the advice of an attorney has no bearing on the issue of wilfulness. That has to be determined by the very facts that make up the crime: One, were the questions put to him proper and material, and, two, was there a refusal to answer those questions, a refusal clearly reflective of an intention to avoid his legal obligation to testify? I say that those facts clearly establish an intention on the part of the witness Harry Lanza to avoid his legal obligation to testify. At any rate, I say that the advice given by an attorney does not constitute a shield for any witness to protect himself against his deliberate refusal to answer questions before this committee, and I dare say that that position has been stated by the Court time and time again. I don't think it is even necessary for me to furnish authorities on that, for your Honor is well aware that the advice of counsel does not enter into the question of intention to commit a crime.

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Then counsel refers to the Foster case, saying that that case tends to support his contention with respect to the fact that his client—or, rather, his contention that his client was not wilful in refusing to answer questions. The Foster case, your Honor, I think held that the People failed to establish the materiality of the questions put to the witness and I think it was really on that ground that the refusal was not construed as a wilfull refusal. So I don't think that has any bearing on the issue in this case.

Then he makes this argument, your Honor: He says the People have failed to serve—or, rather, the committee had failed to serve a notice of its intention to grant immunity to the witness Harry Lanza upon all the proper authorities that may have been concerned in the matter. I think that is the essence of his general objection.

Now, I say, your Honor, that that provision in 2447 was never intended for the benefit of the witness.

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That provision in 2447 was intended for the benefit of other law enforcement agencies. In other words, it was designed to give other law enforcement authorities an opportunity to voice their approval or objection to this decision to grant immunity.

And if a prosecutor interested opposes the grant of immunity then the competent agency contemplating giving the grant of immunity is not even prohibited but would consider and determine whether that objection is a valid one or not. That is all that means.

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It is really a provision designed to achieve a higher degree of integration of action with respect to the field of law enforcement. But if you read Subdivision 5 of 2447 you will find that the failure to give a notice of an intention to grant immunity to any prosecutor involved does not deprive the defendant of the immunity granted by the competent agency.

So, even assuming that they had deliberately failed to serve notice of this intention upon law enforcement agencies concerned, that failure to serve such notice would not affect one iota the immunity already accorded the witness. So that that contention, your Honor, is absolutely specious and completely unwarranted and has no bearing on the issue in this case.

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Then counsel makes this argument, which I think is his most substantial argument: that the Joint Legislative Committee was not clothed with sufficient power to grant an immunity which would be as broad as the privilege against self-incrimination. Now, I say to your Honor, Mr. Direnzo is completely misinformed as to the power that is vested in a competent agency under Section 584 or 381. I think the language of those Sections is very clear, and with your Honor's permission I would like to read the language of 584?

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The Court: You may.

Mr. Scotti: "No person shall be excused from attending and testifying or producing any books, papers or other documents before any court, magistrate or referee or before any joint legis-

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lative committee upon any investigation proceedings or trial for or relating to or concerned with a violation of any of the provisions of this article upon the ground or for the reason that the testimony or evidence documentary or otherwise required of him may tend to convict him of a crime or subject him to a penalty or forfeiture, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction matter or thing concerning which he may so testify or produce evidence documentary or otherwise, and no testimony so given or produced shall be received against him upon any criminal investigation proceeding or trial."

And, of course, this was later on amended so as to have 2447 operate in conjunction with 584.

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Now, let me stress that portion of the Section which says "no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction matter or thing concerning which he may so testify." The language is very clear. I don't care what difference of opinion might have been entertained prior to June 19th. Anyone who understands English, and this is very simple English, should be able to infer from a mere reading of this Section that a witness called to testify in connection with an investigation concerning the crime of conspiracy, receives immunity from prosecution for any crime that may be revealed by him in the course of his interrogation.

That very same explanation was made in the case of People against Breslin about three or four years ago by the Court of Appeals, and

that very same interpretation was had I think in a case which I had the pleasure of trying before your Honor, *People against Saperstein*. So that the immunity given to a witness under the Section is not necessarily limited to the crime that is being investigated, because if that contention were to obtain you could see, your Honor, how every one of these immunity statutes would be rendered inoperative because it is almost inconceivable for a witness to give testimony only with respect to one particular crime—there may be other crimes involved, and that contention could be raised continuously so as to reduce these immunity statutes to utter nullities.

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So, your Honor, there is no doubt that under 584 the witness was given an immunity which was as broad as his privilege against self-incrimination. That interpretation of 584 was made by Judge Cardozo in the case of *People against Reiss*. I do not recall the citation. And, also curiously and rather significantly in the *Matter of Doyle*.

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The Court: That was a Cardozo opinion too.

Mr. Scotti: Yes, that is right.

Now, I would like to spend a few minutes on that case, if I may, your Honor, to give the genesis of this amendment of Section 584 which included the Joint Legislative Committee as a competent agency to confer this immunity. In 1931 as your Honor may recall the Hofstadter Committee came into being which is similar to the present Joint Legislative Committee. That was known as the Joint Legislative Committee

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but it was also called the Hofstadter Committee. I think it was named after Senator Hofstadter who had introduced the resolution—I may be mistaken?

The Court: I think not, I think that was the Seabury Commission.

Mr. Scotti: No. Seabury was the attorney, but Hofstadter was one of the legislators sitting on that committee.

Mr. Dorenzo: Hofstadter.

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Mr. Scotti: Yes. Now, Doyle had refused to answer questions.

The Court: Seabury was one of the counsel.

Mr. Scotti: He was the counsel.

Mr. Dorenzo: It was the Hofstadter Committee.

Mr. Scotti: In 1931 Doyle refused to answer questions before this committee, and Seabury sought to have him punished for contempt under Sections 584 and 381 as they then existed. At the time Doyle refused to answer those questions, this Section 584 was the same, with one exception: the part that says 'before any court, magistrate or referee' did not include 'before any joint legislative committee'.

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So Judge Cardozo said in that opinion 'the section is all right, broad enough'—I mean 'it confers power upon any competent agency mentioned in the section to grant immunity broad enough to meet the privilege but it does not grant any power to the joint legislative committee, it is not mentioned'.

'There is no doubt' said Cardozo, 'if the joint legislative committee had been a competent agency

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specifically mentioned in that section, contempt proceedings would have been valid'; and of course with respect to 381 at that time, 381, the immunity offered under 381 was strangely restricted only to the crime of receiving a bribe—it did not have the language of 584; and Cardozo said with respect to 381 that if 381 had the language that 584 had and further had included the joint legislative committee, then they would be authorized to proceed.

So, with that adverse decision, the Legislature within two weeks after the decision came down in August 1931, amended 584 to include the joint legislative committee. So that a history of the amendment of 584 will clearly show that this committee which was comparable to the committee of 1931 had the power at all times to grant an immunity to a witness which was as broad as his privilege. 770

Now, Mr. Dierenzo I think made another argument before your Honor which was intended to show that the questions put to the witness were really unnecessary because the information they claim they sought to elicit from the witness had already been reflected in the tapes. I think that was the point of his last argument. Am I correct, Your Honor? 771

The Court: One point, yes.

Mr. Scotti: Now, I say that that is taking a very naive view of the investigatory policy and methods of any committee or prosecutor worth his salt. A mere reading of the transcript would show that there were many allusions in this con-

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versation between the two brothers which implied matter that was of great interest to the committee but which certainly required further clarification. For instance, at one time he referred to the one with the glasses. Well, they have a right to know 'Whom did you mean when you said the man with the glasses' ''?

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And, do not let us be naive and say that calls for an operation of the mind, —it does not. It calls for the establishment of a fact which was deemed to be within his ken, and, the committee were entitled to know.

In other words, they were entitled to go beyond the facts reflected in that particular conversation, and his refusal to do so was really a calculated effort to stymie and frustrate and thwart the committee in its efforts to acquire further enlightenment on the situation.

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Then counsel made another argument, with respect to the fact that these questions put to the witness were based on conversations that were heard through eavesdropping. I say, your Honor, the fact that these conversations were the products of eavesdropping is absolutely irrelevant and immaterial to the issue in this case. We are not concerned with the morality of the practice alluded to—that is not within the province of the Court, may I say respectfully; and even within my province as a prosecutor.

The fact is that the products are legally admissible in evidence, and, if they are legally admissible in evidence there then devolves upon me

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the duty to prosecute, and I may say respectfully upon the Court the duty to consider such evidence.

Now, I want to note that at the time those conversations were heard through this eaves-dropping device, there was no law in existence that proscribed such practice—your Honor recalls?

The Court: I recall.

Mr. Scotti: And the law that might have been inspired by these revelations went into effect I think on July 1st 1957.

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The Court: That is correct.

Mr. Scotti: But even so, and this is wholly academic and your Honor will pardon me if I embark upon an excursion into collateral matters here, but even assuming that the law had been in effect at the time this took place, your Honor well knows under the DeFore case no matter how the evidence was obtained, it could be obtained in the most reprehensible fashion, nevertheless the evidence is legally admissible. So that I don't see how that particular fact has any bearing on the issue in this case.

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Now, your Honor, I am satisfied beyond— Well, it is not proper for me to express an opinion here—there is no jury here—but beyond the peradventure of a doubt that this joint legislative committee did have the power to grant immunity upon this witness, an immunity which was as broad as his privilege against self-incrimination; and further, this witness wilfully refused to answer the questions put to him by the committee.

I do not again intend to reflect on opposing

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counsel but I must observe that this kind of legalistic defense, this legal explanation attempted before the committee and repeated before your Honor, is nothing but a transparently specious contrivance to enable a witness, in this case Mr. Lanza, to enable him to avoid his legal obligation to testify. That is about the size of it.

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In other words, as I see it in essence it is a bold, contumacious effort on his part to flout the very sovereignty of The State of New York. And, if we are to have orderly democratic government; if we are to uphold the very sovereignty of The State of New York, I say we must insist on the supremacy of law, your Honor; because it is only through the supremacy of law that orderly democratic government is made possible; and when I refer to the supremacy of law, your Honor, I mean that law under our democratic system before which all people are treated alike.

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In other words, your Honor, the issue in this case is simply this, as I see it: Is the defendant bigger than the law, bigger than the government, bigger than the sovereignty of The State of New York? Is he permitted to flout the very dignity and sovereignty of our State?

I am confident that when you consider as you undoubtedly have the evidence in this case you will conclude: One, that the committee was duly authorized to confer upon him an immunity which is as broad as his privilege against self-incrimination; and Two, that he wilfully refused to give testimony before this committee.

The Court: Your motion is in all respects denied, Mr. Dorenzo. In reply to your arguments I must advise you that I am satisfied from an examination of the record and the law that the committee, in this case the Joint Legislative Committee on governmental practices was properly constituted. I believe that it did have adequate power properly to clothe this witness with an immunity commensurate with the privilege which was destroyed.

You made reference during the course of your argument on Friday to the defendant being the target of the committee's investigation. That seems to fail in the light of the fact that the committee was initially constituted on February 2nd 1955, and the matter with respect to which this witness was interrogated apparently occurred some time shortly prior to June 19th of 1957. So that there could have been in the mind of the Legislature no desire or intention of making this witness the target of any criminal procedure.

With respect to the opinion of the Committee in referring it's findings to the District Attorney as to whether or not there was a wilful refusal on the part of the witness, I must repeat to you that their opinion is utterly unimportant.

Article 13 of our State Constitution headed Public Officers, reads as follows: "Members of the Legislature and all officers, executive and judicial, except such inferior officers as shall be by law exempted shall before they enter on the duties of their respective offices, take and subscribe to the following oath or affirmation "I do solemnly

swear (or affirm) that I will support the Constitution of the United States and the Constitution of The State of New York and that I will faithfully discharge the duties of the office of blank according to the best of my ability”.

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Obviously it was the duty of the legislators to call to the attention of the District Attorney anything that might lead to an investigation which in turn might lead to a charge of the commission of a crime. Obviously it was the duty of the District Attorney to use all evidence which he could properly present to a grand jury in order that the grand jury might determine whether or not to accuse the defendant.

I believe you will find in the Constitution antedating the Constitution of 1938 a specific provision in Article 10, that any District Attorney who failed to do so must be removed from office. This new oath which has been substituted is in substance the equivalent of that.

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There was argument made by you with respect to the fact that the interception of communication was between husband and wife or attorney and client in possibly one or two of the questions which were made the subject of counts in the indictment.

With respect to that you must be aware of the fact that the evidence of such otherwise confidential communication is always admissible. It is only the husband and wife or the lawyer who is prohibited from becoming a witness in any legal proceeding, but the product of the overhearing of any such communication is always admissible.

So that whether we like it or not that is the law of this State.

You made reference to the enactment of the Civil Practice Act provision taking effect in 1957, July 1 with respect to the use of eavesdropping testimony or evidence in civil matters. No matter how it was obtained, it was admissible in this criminal proceeding which resulted in the indictment which has come before me.

You have stressed the question of the wilfulness of the defendant's refusal to answer. Of course, there is no doubt that wilfulness involves a determination of the operation of the mind of the person charged therewith. There is no way that I know of whereby we can go inside of a person's head and find out what is going on in his mind but we can arrive at that determination by what the person says, by what he fails to say, or what he does, and the circumstances under which he says or fails to say or does certain things. 788

I have come to the conclusion that this defendant has violated the provisions of Section 1330 of the Penal Law. Will the defendant please rise? (Defendant rises.) 789

This Court finds you guilty of the crime of refusing to testify, in violation of Section 1330 of the Penal Law under each of the 19 counts contained in Indictment 2157 of 1957. Sentence will be imposed on February 20th; the Probation Department to investigate and submit a report in the meantime.

Mr. Drenzo: Will you Honor continue bail?

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Court's Decision

The Court: Yes. (Defendant is sworn by the Clerk, who takes his pedigree.)

A true copy of our stenographic notes:

LOUIS FRANK
Official Court Stenographer.

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EMANUEL MORRIS
Official Court Stenographer.

LEWIS COHAN
Official Court Stenographer.

IRWIN T. SHAW
Official Court Stenographer.

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Sentence

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THE COURT OF GENERAL SESSIONS
OF THE COUNTY OF NEW YORK
(Part 8)

Indictment No. 2157-57

THE PEOPLE OF THE STATE OF NEW YORK,

VERSUS

794

HARRY LANZA,

Defendant.

SENTENCE PROCEEDINGS:

Before:

HON. JOHN A. MULLEN,

Judge.

Date: February 20th 1958. 795

Appearances:

ALFRED J. SCOTTI, Esq.,
 Assistant District Attorney,
 For the People.

MICHAEL P. DIRENZO, Esq.
 Attorney for Defendant.

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Sentence

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(Note: Defendant was indicted for Violation of Section 1330 of the Penal Law by Indictment filed on June 28th 1957. On January 20th 1958 defendant tried, without a jury, and the Court finds the defendant did violate all 19 Counts of the Indictment.)

(Defendant now here for sentence.)

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The Clerk: Harry Lanza to the bar.

Harry Lanza, is that your name?

The Defendant: That's right.

The Clerk: Have you any legal cause or other reason why judgment of the Court should not now be pronounced against you according to law?

The Defendant: No.

The Clerk: No legal cause, and his counsel Michael J. Drenzo is present as counsel.

Mr. Drenzo: May I proceed, your Honor?

The Court: Yes, Mr. Drenzo.

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Mr. Drenzo: May it please the Court, I am not going to burden the Court with a long line of facts concerning this defendant's background.

Suffice it to say, your Honor has a detailed probation report. I know the report can indicate the type family man this defendant is. It shows his background, and I think it also shows that he has always been engaged in a legitimate occupation, a devoted father, a dutiful father, a good parent, and a good husband.

The gravamen of his offense here or this plight, his present plight, is the result of if we want to

give it the worst complexion imaginable, was possibly an attempt to do something to help a brother, if such be the case.

It is not a case where the grand jury or a legislative committee was interested in ascertaining what transpired between two brothers. The fact of the matter is that they know each and every single word that was uttered between these two men.

There is no doubt also that in treating this matter it has always been a legal proposition as to whether or not certain safeguards were afforded this particular defendant. We have stated our position. We have stated it clearly before the Court, and I think we were very, very honest in our entire approach to this problem, if your Honor pleases.

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We waived a jury. We did not try to hide behind facts. We did not try to sell anybody a bill of goods.

We met the issues. I think we met them fairly. I think we met them honestly. I think we met them sincerely.

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Now, if your Honor pleases, I am going to ask you to be as merciful as you possibly can under all of the circumstances. There is little I can add to what has already been said to your Honor during the trial and before the trial and after the trial.

If your Honor please, he is in your hands.

The Court: Mr. Direnzo, I cannot agree with you that your client met the situation honestly and forthrightly.

Lanza, under each of 19 counts of Indictment No. 2157 of 1957 you have been convicted under Section 1330 of the Penal Law of the misdemeanor of wilfully refusing to answer a material and proper question before the Joint Legislative Committee on Government Operations which was a Legislative Committee authorized to summon witnesses and which Committee summoned you before it and swore you as a witness.

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Each of the questions which you refused to answer was a material and proper question.

Extensive arguments have been advanced by your counsel for the purpose among others of persuading me that your refusals to answer were not wilful because you sincerely believed that the immunity, if any, with which the Committee clothed you was not as broad and complete as was the Constitutional privilege against self-incrimination which might be invaded by your answering the questions asked of you by the Committee.

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Those arguments made at the trial and repeated here today fail to persuade me. An examination of the record of this trial leads inescapably to but one conclusion. That conclusion is that you knew the nature of the investigation being conducted by the Committee and that when you were subpoenaed as a witness you deliberately, intentionally and wrongfully and consciously, in violation of law, premeditatedly decided that you would answer no question which the Committee might ask if such answer would aid the Committee in solving the problem which solution was the objective of their investigation.

Judgment

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This trial record and my probation report convince me that you were determined in every way possible to frustrate this Committee rather than aid it.

You appear to have determined to set yourself up as a road block in the path of this Committee and the Legislature and the sovereign People of The State of New York. That carries with it a heavy responsibility.

The fact that to date you appear to have succeeded in your objective carries with it an even heavier responsibility. 806

Therefore, the sentence of the Court is that upon your conviction under the first count of the said Indictment No. 2157 of 1957 you are sentenced to the Penitentiary of The City of New York for the term of One year.

Upon your conviction under the second count of said Indictment, you are sentenced to the Penitentiary for the term of One year. This sentence shall run consecutively to the sentence imposed under the first count. 807

Upon your conviction under the third count of said Indictment you are sentenced to the Penitentiary for the term of One year. This sentence shall run consecutively to the sentences imposed under the first and second counts.

Upon your conviction under the fourth count of said Indictment you are sentenced to the Penitentiary for the term of One year. This sentence shall run consecutively to the sentences imposed under the first, second and third counts.

Upon your conviction under the fifth count of

Judgment

808

the said Indictment you are sentenced to the Penitentiary for the term of One year. In as much as the question herein involved is in substance part of the question involved in the fourth count of this Indictment, this sentence shall run concurrently with the sentence imposed upon your conviction under the fourth count of the indictment, but shall run consecutively to the sentences imposed under the first, second and third counts of this indictment.

809

Upon your conviction under the sixth count of the said Indictment you are sentenced to the Penitentiary for the term of One year. This sentence shall run consecutively to the sentences imposed under the first, second, third, fourth and fifth counts of this Indictment.

810

Upon your conviction under the seventh count of this indictment you are sentenced to the Penitentiary for the term of One year. However, in as much as the question herein involved is another facet of the question involved in the sixth count of the Indictment, the sentence under this count shall run concurrently with the sentence imposed upon your conviction under the sixth count of this Indictment, but shall run consecutively to the sentences imposed under the first, second, third, fourth and fifth counts of this indictment.

Upon your conviction under the eighth count of this Indictment, you are sentenced to the Penitentiary for the term of One year. This sentence shall run consecutively to the sentences imposed under the first, second, third, fourth, fifth, sixth and seventh counts of the indictment.

Upon your conviction under each of the ninth, and 10th counts, of this Indictment, you are sentenced to the Penitentiary for One year. However, in as much as each of the questions involved in these two counts of the Indictment are parts of the question involved in the eighth count of the Indictment, each of these two sentences shall run concurrently with each other and concurrently with the sentence imposed under the eighth count of the Indictment, but consecutively to the sentences imposed under the first, second, third, fourth, fifth, sixth and seventh counts of the Indictment. 812

Upon your conviction under the eleventh count of the Indictment you are sentenced to the Penitentiary for One year. This sentence shall run consecutively to the sentences imposed under the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth and 10th counts of this indictment.

Upon your conviction under the twelfth count of the Indictment you are sentenced to the Penitentiary for One year. This sentence shall run consecutively to the sentences imposed under the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth and 11 counts of this Indictment. 813

Upon your conviction under the thirteenth count of the Indictment you are sentenced to the Penitentiary for One year. However, in as much as the question herein involved is another facet of the question involved in the 12th count, this sentence shall run concurrently with the sentence imposed under the twelfth count of this Indict-

Judgment

814

ment, but shall run consecutively to the sentences imposed under the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth and 11th counts of this Indictment.

815

Upon your conviction under the fourteenth count of this Indictment, you are sentenced to the Penitentiary for the term of One year. This sentence shall run consecutively to the sentences imposed under the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth and 13th counts of this Indictment.

816

Upon your conviction under each of the fifteenth, sixteenth, seventeenth and eighteenth counts of this Indictment, you are sentenced to the Penitentiary for the term of One year. However, in as much as the questions involved in these counts are different facets of the same question involved in the fourteenth count, each of these sentences under the fifteenth, sixteenth, seventeenth and eighteenth counts of the Indictment shall run concurrently with each other and concurrently with the sentence imposed under the fourteenth count, but consecutively to the sentences imposed under the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth and 13th counts of this Indictment.

Upon your conviction under the nineteenth count of this Indictment you are sentenced to the Penitentiary for the term of One year. This sentence shall run consecutively to the sentences imposed under the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh,

twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth and eighteenth counts of this Indictment.

In imposing these sentences where I have referred to a question as being part of another question or a different facet of another question I consider and have ruled nevertheless that such questions were material and proper questions, but I deem it not within the spirit of our law to punish twice for what is substantially the same offense committed in different fashions.

818

The questions in my opinion were properly propounded by counsel for the Committee or a member of the Committee because in my opinion no such counsel and no such member of such an investigatory committee should be bound by the first answer of any witness who shows indication of being an adverse witness, and, such counsel or such committee member should be permitted legally and properly to prod the memory of such a witness to the fullest extent.

819

I might add at this time, not as part of the sentence, but as a suggestion to the Legislature of this State which is now in session, that they might well give thought to amending that Section 1330 of our Penal Law to make it a felony for any witness wilfully and wrongfully and intentionally to defy The People of The State of New York through their legislature or a committee thereof when the People of this State through their legislature or such committee are trying to solve a problem which is a proper problem for them to

Judgment

820

solve in the full pursuance of their duties as such legislators or committee members.

The defendant will be committed.

Mr. Direnzo: At this time, if your Honor pleases, might I ask that your Honor stay the execution of this sentence until Monday.

The Court: I can see no reason for it.

Mr. Direnzo: Might I then ask your Honor to withhold the commitment until Monday.

821

The Court: I can see no purpose to be served by that.

Mr. Direnzo: Except that I may want to draw legal documents, if your Honor pleases, and I would like to have the defendant available to me.

It's only that I am asking for this courtesy for myself so that I won't be burdened by having to run out to the Penitentiary, if your Honor pleases.

822

The Court: I am sorry to inconvenience you, Mr. Direnzo, but I don't take lightly the defiance of the authority of The People of The State of New York by anybody, and I will not by any act of mine make it appear that I do take such defiance lightly.

EMANUEL MORRIS,
Official Court Stenographer.

Stipulation and Order Re Exhibit 4

820a

COURT OF GENERAL SESSIONS**COUNTY OF NEW YORK**

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,**—against—****HARRY LANZA,****Appellant.**

821a

IT IS HEREBY STIPULATED AND AGREED, by and between the attorneys for the respective parties hereto, that the following be deemed and considered a part of Exhibit 4 in Evidence:

Pages 1817 to 1823 inclusive, of the official typewritten transcript of proceedings of the Committee on Government Operations dated June 19, 1957, as well as

Pages 1829 and part of 1832, part of 1835-1840, and part of 1842.

Dated, New York, New York,
February 10, 1959.

822a

MICHAEL P. DIRENZO
Attorney for Appellant

ALFRED J. SCOTT
Acting District Attorney,
New York County
Attorney for Respondent

SO ORDERED:

JOHN A. MULLEN
*Judge of the Court of
General Sessions*

Excerpts from People's Exhibit 4

823

(1816)

MINUTES OF THE PROCEEDINGS OF THE JOINT LEGISLATIVE COMMITTEE ON GOVERNMENT OPERATIONS, HELD AT THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, 42 WEST 44TH STREET, NEW YORK CITY, ON JUNE 19, 1957, AT 11:00 A.M.

. . .

(1829)

Ellen Lanza,
Harry Lanza

and

Louis Georgiano;

824

that at said time the committee will have before it the question of granting immunity to said witnesses, pursuant to Sections 2447, 584 and 381 of the Penal Law; that this notice is given pursuant to Section 2447 of the Penal Law.

Dated: New York, N. Y.,
June 17, 1957.

Yours, etc.,

825

ARNOLD BAUMAN
Chief Counsel for Committee
Office and P. O. Address
217 Broadway
New York, N. Y.

To:

Hon. Louis J. Lefkowitz
Attorney General of the
State of New York
80 Centre Street
New York, New York

826

Excerpts from People's Exhibit 4

(1830) Hon. Frank S. Hogan
 District Attorney of
 New York County
 155 Leonard Street
 New York, N. Y.

Hon. Joseph F. Gagliardi
 District Attorney of
 Westchester County
 County Courthouse
 White Plains, N. Y."

827

There is inscribed on this notice an acknowledgement that the same was received by Louis J. Lefkowitz, Attorney General, on June 17, 1957.

There is also inscribed on this notice an acknowledgement that it was received by the District Attorney of Westchester County on June 18, 1957.

There is also inscribed on this notice an acknowledgement that it was received by the District Attorney's office of New York County on June 17, 1957.

828

I offer this notice in evidence.

Mr. Drenzo: Mr. Chairman, in view of the fact that that notice also concerns clients that I represent before this committee, might I have—

Mr. Bauman: (Interposing) Will you identify yourself for the record.

(1831) Mr. Drenzo: Michael P. Drenzo.

The Chairman: Mr. Drenzo, I think it would be much more orderly when your clients are called, I think you should make your objection at that time.

Mr. Drenzo: All right.

The Chairman: Any objections to be made at this time should be made by Mr. Roseman.

Mr. Roseman: I had intended to. I didn't know whether Assemblyman Corso had finished. I was going to object to the introduction on the ground that it is incompetent notice as a matter of law on the ground that the previous statements were that they were limited to Sections 584 and 381 of the Penal Law and I reiterate my objection made at the beginning that in order to destroy the privilege against self incrimination granted by the New York State Constitution and the United States Constitution, that the power to grant immunity must be as broad and not be limited to the immunity under those sections stated by Assemblyman Corso, I believe, or Senator Zaretzki and under the doctrine of Doyle against Hofstadter in which Judge Cardozo stated the law on how and when a legislative committee can grant immunity.

830

The Chairman: Unless there is some dissent on the part of the committee, the objection will be (1832) overruled. 831

Assemblyman Corso: Might I again point out to clarify the record, I have merely offered in evidence a notice under Section 2447 of the Penal Law to the District Attorney of New York County, the District Attorney of Westchester County, and the Attorney General of the State of New York. That is all I have done.

. . .

(1835) Assemblyman Corso: Mr. Chairman, at this time I move that despite the objection of the

832

Excerpts from People's Exhibit 4

witness, he shall not be excused from testifying and that the witness be ordered to testify and that if the witness complies with the order to testify, he be granted immunity as authorized by Sections 2447, 381 and 584 (1836) of the Penal Law of the State of New York, so that he shall not be prosecuted or subjected to any penalty or for any forfeiture for or on account of any transaction, matter or thing concerning which he might answer or produce evidence and that no such answer given or evidence produced by him shall be received against him upon any criminal proceeding.

833

I move, Mr. Chairman, the adoption of this motion.

The Chairman: Is that seconded?

Senator Greenberg: Seconded.

The Chairman: The motion was made by Mr. Corso and seconded by Senator Greenberg.

Is there any discussion on this motion?

834

(No response.)

The Chairman: If not, the secretary will call the role.

Assemblyman Corso: Senator Greenberg.

Senator Greenberg: Aye.

Assemblyman Corso: Senator Zaretzki.

Senator Zaretzki: Aye.

Assemblyman Corso: Senator McGahan.

Senator McGahan: Aye.

Assemblyman Corso: Assemblyman Bannigan.

Assemblyman Bannigan: Aye.

Assemblyman Corso: Assemblyman Carlino.

(1837) Assemblyman Carlino: Aye.

Excerpts from People's Exhibit 4

835

Assemblyman Corso: Assemblyman Horan.

The Chairman: Aye.

Assemblyman Corso: Assemblyman Corso.
Aye.

The Chairman: The motion is now declared adopted by a majority of the committee. The entire committee.

Mr. Roseman: May I at this time object to the adoption of such motion as contrary to the statutes provided herein.

Section 2447 indicates that this committee can only vote a direction or a contempt on a majority. Full membership of this committee, not including the ex-officio members.

836

I say as a matter of fact, you do not have the full membership of this committee so that a majority could not vote on my motion thereon. That's preliminary objection.

The Chairman: That objection will be overruled and again, Mr. Roseman, I will not discuss the law with you. I just won't discuss it except I'm sure you will find that the ex-officio members of this committee have all the powers, all the rights of the members of the committee.

837

Mr. Roseman: I don't want to dispute the Chairman but may I have for the record, the members of the (1838) regular Joint Legislative Committee that are absent at this session, the number.

The Chairman: Mr. Roseman, look—

Mr. Roseman: (Interposing) May I have for the record—

The Chairman: (Interposing) It is too warm an afternoon to be giving you a list of—don't you know who the members of the full committee are?

838

Excerpts from People's Exhibit 4

Mr. Roseman: No, I don't.

The Chairman: Well, I'm sorry. Then we will give them to you.

Mr. Roseman: Just the absent members.

The Chairman: Just the absent members. Senator Hults, Senator Erwin, Assemblyman MacKenzie, Mr. Dickinson, Assemblyman Dickinson; and of the ex-officio members, Mr. Mahoney and Mr. Heck.

839

Mr. Roseman: May I also make an objection to the motion—

The Chairman: (Interposing) Your first one is overruled.

Mr. Roseman: I understand that. If I were in a court I would take exception respectfully.

May I say that Judge Cardozo and—

The Chairman: (Interposing) I hope if you took the exception here you would take it respectfully, too.

(1839) Mr. Roseman: Yes.

840

Judge Cardozo, in a case similar to—about twenty-five years ago, said to force disclosure from the unwilling lips of a witness, immunity must be so broad that the risk of prosecution is ended altogether. A privilege cannot be removed if there are loopholes in the tender of immunity through which a prosecutor can cut a hole and indict and convict and I say that the statement by the associate members of this committee merely stated that the immunity is limited to the Sections 581—584 and 381, so that if there could possibly be another crime, other than those two men-

Excerpts from People's Exhibit 4

841

tioned, this committee could not tender any immunity and therefore, the privilege granted by the state constitution cannot be taken away by any tender of immunity under a direction to answer.

The Chairman: Mr. Roseman, so that there will be no misunderstanding on the part of you and your client, the grant of immunity is not limited. The right to grant immunity is limited to an inquiry as to certain specific crimes.

842

Now, I wish to say that most emphatically so that there may be no question in the minds of either you or your client, that the immunity to be given by this committee is not limited. It is simply the occasion (1840) for the granting of the immunity, the inquiry into certain specific crimes.

Assemblyman Corso: May I emphasize, Mr. Chairman, that the offer of immunity to this witness was in words that he shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he might answer or produce evidence and that no such answer given or evidence produced by him shall be received against him upon any criminal proceeding.

843

Mr. Roseman: In answer to Assemblyman Corso, so that the record is straight, it is our contention that this legislative committee, from the grant of legislative power, hasn't got the power to grant immunity to any crime.

The Chairman: That is your contention but the record will now show the attitude of the committee expressed to you and your client as to the

844

Excerpts from People's Exhibit 4

power of this committee, so that there may be no later claim of any misunderstanding in the event of a continued refusal to answer questions.

. . .

(1842) (The reporter read as follows:

"Q. Mr. Georgiano, on February 6, 1957, you checked into the Surfcomber Hotel in Miami Beach, Florida, is that correct?")

845

Q. Will you answer that question now, please?

A. I refuse to answer on the same grounds and also on the the grounds of my counsel.

The Chairman: On advice of counsel?

The Witness: On advice of counsel.

The Chairman: Mr. Georgiano, so we will have no misunderstanding along those lines, you realize that the advice of counsel doesn't remove any responsibility from you in refusing to answer these questions. In case you don't realize it, we will advise you now so the Committee orders you to answer that question.

846

The Witness: I refuse to answer on the same grounds.

Mr. Roseman: So the record is clear, the witness has refused to answer on the ground that the answer may tend to incriminate him and upon advice of counsel, based on my remarks to this Committee.

. . .

Stipulation as to Exhibits

847

SUPREME COURT
OF THE STATE OF NEW YORK
APPELLATE DIVISION—FIRST DEPARTMENT

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

HARRY LANZA,

Appellant.

848

Subject to the Approval of the Court

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto, that the following numbered and described exhibits:

PEOPLE'S EXHIBITS

4. Typewritten transcript of proceedings dated June 19, 1957 of Joint Legislative Committee on Government Operations (the following pages 1829 and part of 1832, part of 1835-1840, and part of 1842, to be incorporated in the printed record on appeal.
6. Copy of notice of proceedings entitled "Inquiry and Investigation of the New York State Joint Legislative Committee on Government Operations into the Parole of Joseph Lanza" served on the Attorney General of the State of New York, District Attorneys of New York and Westchester Counties.

849

850

*Stipulation as to Exhibits***DEFENDANT'S EXHIBITS**

- B. Division of Parole Reports in connection with violation of Parole referring to Joseph Lanza excluding the part thereof referring to defendant in case on trial.
- C. A typewritten transcript of conversation had February 7, 1957 between Joseph Lanza and Mrs. Ellen Lanza and between Joseph Lanza and Sylvester Cosentino at the Westchester County Jail.
- 851 D. A typewritten transcript of conversation had February 13, 1957 between Joseph Lanza and Mrs. Joseph Lanza at the Westchester County Jail.
- E. A typewritten transcript of conversation had February 13, 1957 between Joseph Lanza and Harry Lanza at the Westchester County Jail.

852

need not be printed or reproduced in the printed record on appeal, but that the originals thereof will be handed up on the argument or submission of the appeal herein, with the same force and effect as if incorporated in the printed record on appeal.

These exhibits are to be filed on or before the Wednesday preceding the first day of the term for which the appeal is noticed for argument.

Dated: New York, N. Y., January 22, 1959.

MICHAEL P. DIRENZO

Attorney for Defendant-Appellant

FRANK S. HOGAN

per **RICHARD G. DENZER, A.D.A.**

Attorney for Respondent

So Ordered:

B. B.

Affidavit of No Other Opinion

853

STATE OF NEW YORK }
 COUNTY OF NEW YORK } ss.:

MICHAEL P. DIRENZO, being duly sworn, deposes and says:

I am the attorney for the defendant-appellant in this action, and I am familiar with all the proceedings herein.

That no opinion or memorandum was rendered 854
 by the Court below except the oral decision
 printed herein at pages 261-263.

MICHAEL P. DIRENZO

Sworn to before me this
 day of January, 1959.

MURRAY I. KURZ
 Notary Public, State of New York
 Commission expires March 30, 1960

855

856

Clerk's Certificate

I, F. HOWARD BARRETT, Clerk of the Court of General Sessions of the County of New York, held in and for the County of New York, do hereby certify that the foregoing is a copy of the printed record on appeal to the Appellate Division of the Supreme Court, First Department, in the case of The People of the State of New York against Harry Lanza, convicted by the Court without a jury of nineteen (19) counts of the crime of Refusing to Testify.

857

Said papers on appeal have been compared by me with the originals now on file in the office of the Clerk of said Court of General Sessions and are correct transcripts therefrom and of the whole of such originals, except exhibits omitted pursuant to stipulation and order.

Given under my hand and attested by the seal of the said Court this day of January, in the year of our Lord one thousand nine hundred and fifty-nine.

858

F. HOWARD BARRETT
Clerk of Court

(L.S.)

ADDITIONAL PAPERS

to the

COURT OF APPEALS

Certificate Granting Leave to Appeal to the 859
Court of Appeals

SUPREME COURT
OF THE STATE OF NEW YORK
APPELLATE DIVISION—FIRST DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,
Plaintiff-Respondents*

—against— 860

HARRY LANZA,
Defendant-Appellant.

I, HAROLD A. STEVENS, an Associate Justice of the Appellate Division of the Supreme Court, First Department, do hereby certify that in the record of proceedings in the Court of General Sessions of New York County in the case of The People of the State of New York against Harry Lanza questions of law are involved which ought to be reviewed by the Court of Appeals of the State of New York, and leave is hereby granted to the defendant-appellant to appeal to the Court of Appeals of the State of New York so that the said questions of law may be reviewed by said Court. 861

Dated, New York, the 13th day of May, 1960.

HAROLD A. STEVENS
*Justice of the Appellate Division of the
 Supreme Court, First Department*

862

Notice of Appeal to the Court of Appeals

COURT OF GENERAL SESSIONS

NEW YORK COUNTY

THE PEOPLE OF THE STATE OF NEW YORK**—against—**

863

HARRY LANZA,**Defendant-Appellant**

S I R S :

864

PLEASE TAKE NOTICE that, pursuant to permission granted by order of Honorable Harold A. Stevens, Associate Justice of the Appellate Division, First Department, of the Supreme Court, on the 13th day of May, 1960, the defendant above named hereby appeals to the Court of Appeals from the order and judgment of the Appellate Division, First Judicial Department, made and entered on the 21st day of April, 1960, affirming the judgment of the Court of General Sessions of the County of New York, rendered on the 20th day of February, 1958, convicting the defendant of the crime of Refusing to Testify, (Penal Law, Section 1330), and reducing the sentence from ten years to one year, and said appeal is taken from each and every part of said order and judgment.

Dated, May 16th, 1960.

Notice of Appeal to the Court of Appeals 865

Yours, etc.,

MICHAEL P. DIRENZO

Attorney for Defendant-Appellant

Office & P. O. Address

253 Broadway

New York 7, N. Y.

To:

HON. FRANK S. HOGAN

District Attorney, New York County

866

CLERK, Court of General Sessions

100 Centre Street

New York City

867

868 **Order of Affirmance of the Appellate Division**

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 21st day of April, 1960.

Present—Hon. CHARLES D. BREITEL,
Justice Presiding

869 “ BENJAMIN J. RABIN,
“ FRANCIS L. VALENTE,
“ JAMES B. M. McNALLY,
“ HAROLD A. STEVENS, *Justices*

2382

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—VS.—

870 HARRY LANZA,

Defendant-Appellant.

An appeal having been taken to this Court by the defendant-appellant from a judgment of the Court of General Sessions, New York County, rendered on February 20, 1958, convicting defendant of nineteen crimes of Refusing to Testify (Penal Law, §1330), after a trial before the court without a jury, and imposing a sentence of one year of imprisonment on each count, the said sentences to run consecutively as to each of 10 counts

Order of Affirmance of the Appellate Division 871

and the remaining sentences to be served concurrently with the consecutive ones, and said appeal having been argued by Mr. Jacob D. Fuchsberg, of counsel for the appellant, and by Mr. Richard G. Denzer, of counsel for the respondent, and a brief having been filed by New York Civil Liberties Union, as *amicus curiae*; and due deliberation having been had thereon, and upon the opinion of this Court filed herein,

It is unanimously ordered that the judgment so appealed from be and the same is hereby modified, on the law, on the facts and in the exercise of discretion, by directing that the Penitentiary sentences imposed are to run concurrently and not consecutively, and, as so modified, affirmed.

872

ENTER:

VINCENT A. MASSI
Clerk

873

874

Opinion of the Appellate Division**SUPREME COURT****APPELLATE DIVISION—FIRST DEPARTMENT****March 1960****CHARLES D. BREITEL, J.P.****BENJAMIN J. RABIN,****FRANCIS L. VALENTE,****JAMES B. M. McNALLY,****HAROLD A. STEVENS, JJ.**

875

2382

THE PEOPLE OF THE STATE OF NEW YORK,**Respondent,****—against—****HARRY LANZA,****Defendant-Appellant.**

876

Appeal from a judgment of the Court of General Sessions, New York County, rendered February 20, 1958, convicting the defendant of nineteen crimes of Refusing to Testify (Penal Law, §1330), after a trial before Mullen, J. without a jury. On the basis of consecutive sentencing, the defendant received a total sentence of ten years in the Penitentiary.

JACOB D. FUCHSBERG of counsel (LEO PFEFFER with him on the brief; MICHAEL P. DIRENZO, attorney) for defendant-appellant.

Opinion of the Appellate Division

877

RICHARD G. DENZER of counsel (FRANK S. HOGAN, District Attorney, New York County) for Respondent.

EMANUEL REDFIELD attorney for *amicus curiae* New York Civil Liberties Union.

McNALLY, J.:

This is an appeal from a judgment of the Court of General Sessions convicting defendant after a nonjury trial on 19 counts of refusing to testify (Penal Law, §1330) and imposing a sentence of one year of imprisonment in the Penitentiary of the City of New York on each count. The sentences imposed are consecutive as to each of 10 counts, and the remaining sentences are required to be served concurrently with the consecutive ones.

878

Defendant's brother, Joseph Lanza, was arrested for violation of parole in February, 1957, and was restored to parole during the same month by a Commissioner of the State Division of Parole. In June, 1957 the Joint Legislative Committee on Government Operations of the New York State Legislature was investigating the circumstances relating to the said arrest and restoration of parole. Defendant was summoned as a witness and at a hearing held on June 19, 1957 the committee offered him immunity from any prosecution which might result from his testimony and asked him a number of questions relating to efforts on his part to obtain his brother's restoration to parole and concerning a conversation between them apparently dealing with that subject. Despite the immunity offer and the committee's directions, defendant refused to answer any and

879

all of the questions and assigned as ground for his refusals the privilege against self-incrimination. As a result of 19 such refusals the indictment followed.

881

Defendant attacks the judgment on four grounds: (1) the action of the state officials in causing the conversations between defendant and his brother to be electronically intercepted and recorded in the Westchester County Jail was immoral and reprehensible; (2) the questions put to defendant were not "proper" within the purview of section 1330 of the Penal Law; (3) the People failed to prove beyond a reasonable doubt that defendant's failure to answer was wilful; and (4) he was improperly convicted of 19 crimes; that only a single crime is involved and only one sentence may be imposed; in any event, the sentence is excessive.

882

In support of defendant's first contention, he adverts to the following facts. During the days immediately after Joseph Lanza's arrest for parole violation and while he was detained in an institution known as Eastview Prison in Westchester County, he had engaged in various conversations in one of the prison rooms with the defendant, with other relatives and with an attorney; that some of the conversations had been intercepted and recorded by a concealed mechanical device placed there by certain law enforcement officials other than the legislative committee. Included among the recorded conversations was one between defendant and his brother on February 13, 1957, which was the source of the questions asked of the defendant on June 19, 1957.

The said recorded conversations have been the subject of two cases decided by this Court. In

one the court refused to enjoin the present legislative committee from making public the conversation (*Lanza v. New York State Joint Legislative Committee*, 3 A D 2d 531, *aff'd* 3 N Y 2d 92); in the other it was held that the attorney was not in contempt for refusing to answer before the State Commissioner of Investigation questions stemming from the recorded confidential talk. (*Matter of Reuter (Cosentino)*, 4 A D 2d 252.) Those cases related to the attorney-client privilege and did not deal with the legality of the use of the evidence obtained by mechanical eavesdropping.

884

The interception and recording of the conversations had with Joseph Lanza occurred prior to the enactment of section 738 of the Penal Law and sections 813-a and 813-b of the Code of Criminal Procedure and were not then illegal. Defendant, nevertheless, argues the improprieties attending the interception and recording serve to make the questions propounded to the defendant improper within the meaning of the statute (Penal Law, §1330).

The materiality and propriety of any question within the scope of section 1330 is to be determined by its pertinency in the light of the subject matter of the inquiry before the committee. (*People v. Sharp*, 107 N. Y. 427, 455-456.) It is not nor can it be asserted that the questions underlying the counts herein were irrelevant on the subject matter of the committee's investigation.

885

It may be assumed that the interception and recording of the conversation between defendant and his brother were reprehensible and offensive. Material evidence obtained by illegal means is nevertheless admissible. (*People v. Richter's Jewelers*, 291 N. Y. 161; *People v. Defore*, 242

N. Y. 13, *cert. denied* 270 U. S. 657; *People v. Adams*, 176 N. Y. 351, *aff'd* 192 U. S. 585; *People v. Variano*, 5 N Y 2d 391, 394; *People v. Dinan*, 7 A D 2d 119, *aff'd* 6 N Y 2d 715.)

Defendant's reliance upon *Matter of Reuter (Cosentino)* (*supra*) and *Lanza v. New York State Legislative Committee* (*supra*) is misplaced. *Reuter* involved the privilege of attorney and client not here invoked. *Lanza* involved the same privilege and held it did not prevent publication by a third party of intercepted confidential matter passing between attorney and client.

Cases relied on by defendant involving compulsory incriminating testimony such as *Leyra v. Denno* (347 U. S. 556) and *Rochin v. California*, 342 U. S. 165) are beside the point. The constitutional privilege against self-incrimination is satisfied by statutory immunity coextensive therewith. Testimony compelled by virtue of a grant of immunity is not within the ambit of the constitutional privilege. (*People v. Sharp*, *supra*; *Matter of Knapp v. Schweitzer*, 2 N Y 2d 913, *aff'd* 357 U. S. 371.) The legislative committee was engaged in an investigation of matters including the detection and prevention of corrupt practices within the ambit of article 34 of the Penal Law which pertains to bribery and corruption. Section 381 thereof provides for compulsory testimony and immunity from prosecution on account of any matter or thing concerning which a witness testifies and proscribes the use of such evidence against him. The defendant was offered the immunity and thereby accorded the protection afforded by the constitutional privilege.

Defendant's reliance upon advice of counsel and his belief that he had a right to refuse to answer

the questions does not preclude his conviction of the crimes here involved. Wilfulness was found by the trial court as a matter of fact and the record fully supports the finding.

We turn now to other grounds urged for reversal. Defendant argues the indictment alleges only a single crime, and, in addition, the sentence is excessive. Defendant seeks to equate his refusals to testify with a refusal to appear or a refusal to be sworn. We are not here concerned with the latter crimes. Defendant did appear and was sworn; we need not speculate on the effect of his failure to do either. Moreover, it is clear that each wilful refusal to testify on any separate subject constitutes a separate crime and will support the imposition of as many consecutive sentences as there are separate subjects. (*People v. Saperstein*, 2 N Y 2d 210.) However, we are of the opinion, in the light of the circumstances and the absence of any prior criminal record on the part of the defendant, that the total sentence imposed was excessive and that the sentences should have been made to run concurrently with each other. 890

It may well be that the refusals to testify here involved relate broadly to only two separate subjects, the defendant's efforts towards bringing about his brother's release on parole and the conversation had on February 13, 1957 between defendant and his brother. Whether thereby the defendant's 19 refusals to testify as alleged in this indictment constitute only two separate crimes or more, we do not now decide, since the conviction on any one count is sufficient to sustain the sentence as hereby modified. (*People v. Faden*, 271 N. Y. 435, 444-445.) 891

892

Opinion of the Appellate Division

The judgment of conviction should be modified, on the law, on the facts and in the exercise of discretion, by directing that the Penitentiary sentences imposed are to run concurrently and not consecutively, and, as so modified, affirmed.

All Concur.

893

894

Clerk's Certificate

895

I, F. HOWARD BARRETT, Clerk of the Court of General Sessions of the County of New York, held in and for the County of New York, do hereby certify that the foregoing is a copy of the printed record on appeal to the Court of Appeals of the State of New York, from an affirmance by the Appellate Division of the Supreme Court, First Department, in the case of the People of the State of New York against Harry Lanza, convicted by the Court without a jury of nineteen (19) counts of the crime of Refusing to Testify. 896

Said papers on appeal and the remittitur from the said order of affirmance of the Appellate Division have been compared by me with the originals now on file in the office of said Clerk of the Court of General Sessions and are correct transcripts therefrom and of the whole of such originals.

Given under my hand and attested by the seal of said Court this day of , in the year of our Lord, one thousand nine hundred and sixty. 897

F. HOWARD BARRETT
Clerk of Court

[fol. 300]

IN COURT OF APPEALS OF THE STATE OF NEW YORK

Present, Hon. Charles S. Desmond, Chief Judge, presiding.

THE PEOPLE &C., Respondent,

vs.

HARRY LANZA, Appellant.

DECISION AND JUDGMENT—April 27, 1961

This cause having been argued by Mr. Jacob D. Fuchsberg of counsel for appellant and Mr. Richard G. Denzer of counsel for respondent and due deliberation having been thereupon had, it is

Ordered and Adjudged that the judgment appealed from be and the same hereby is modified in accordance with the memorandum herein and, as so modified, affirmed. The Appellate Division having directed that the penitentiary sentences run concurrently and not consecutively and, as so modified, having affirmed the judgment of the Court of General Sessions, we direct that the judgment be further modified by finding defendant guilty of but one crime (*People v. Riela*, 7 N Y 2d 571). It is clear from the determination of the Appellate Division that the number of crimes of which the defendant was found guilty did not enter into the duration of the sentence imposed. No opinion. All concur except Desmond, Ch.J., Dye, and Fuld, JJ., who dissent and vote to reverse and to dismiss the indictment upon the ground that in view of the situation disclosed in *Lanza v. N. Y. S. Joint Legis. Comm.*, 3 N Y 2d 92, the questions which defendant refused to answer were not "material and proper" ones within the meaning of §1330 of the Penal Law.

[fol. 301]

IN COURT OF APPEALS OF THE STATE OF NEW YORK

Present, Hon. Charles S. Desmond, Chief Judge, presiding.

1

Mo. No. 427

THE PEOPLE &C., Respondent,

vs.

HARRY LANZA, Appellant.

ORDER AMENDING REMITTITUR—July 7, 1961

A motion to amend the remittitur in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

Ordered, that the said motion be and the same hereby is granted. Return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

“Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Defendant argued that the imposition of penal sanctions for his refusal to answer certain questions deprived him of liberty without due process of law in violation of the Fourteenth Amendment. The Court of Appeals held that defendant's constitutional rights were not violated.”

And the Court of General Sessions of New York County is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

[fol. 302]

SUPREME COURT OF THE UNITED STATES

No. 236, October Term, 1961

HARRY LANZA, Petitioner,

vs.

NEW YORK.

ORDER ALLOWING CERTIORARI—November 20, 1961

The petition herein for a writ of certiorari to the Court of Appeals of the State of New York is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 303]

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. 236

HARRY LANZA, Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK.

STIPULATION AND ADDITION TO RECORD—February 13, 1962

It is hereby stipulated and agreed between the Petitioner by his attorney Leo Pfeffer, Esq. of 15 East 84th Street, New York 28, New York and the Respondent by Frank S. Hogan, District Attorney of New York County that the attached exhibits be printed as amendments to the record of this case in the Supreme Court of the United States.

Frank S. Hogan, for the People of the State of
New York, District Attorney, New York County,
By Joseph A. Phillips, Assistant District Attorney.

Leo Pfeffer, for the Petitioner, 15 East 84 Street,
New York 28, N. Y., Attorney for Petitioner.

Dated: February 13, 1962.

[fol. 304]

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. 236

HARRY LANZA, Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK.

NOTICE OF ADDITION TO THE RECORD

Please Take Notice of the Following:

First; That according to the New York State procedure the exhibits placed in evidence on the trial of an action may either be printed in the record on appeal or may be handed up to the appellate court on the day of argument.

Second; That the exhibits in the above entitled proceeding have not been printed as part of the record and the respondent intends to refer to these in its reply brief.

Third; That pursuant to a stipulation signed February 13, 1962 between attorneys for the petitioner and respondent the Clerk of the United States Supreme Court is designated to print the enclosed photostats of the exhibits as an appendix or supplement to the record in this case.

Wherefore it is respectfully requested that the attached exhibits be printed as an amendment to the printed record in this case.

Yours etc.

Frank S. Hogan, District Attorney, New York
County.

To: Clerk of the Supreme Court of the United States.

[fol. 305]

Transcript of conversation between JOSEPH LANZA and MRS. JOSEPH LANZA; also between JOSEPH LANZA, MRS. JOSEPH LANZA and SYLVESTER COSENTINO, on February 7, 1957 at Westchester County Jail.

Mrs: Joe, I'm glad to see you. Do you feel all right? You had me very worried. You had me so worried. You look so bad.

JL: Well did they let you in? I wrote you a letter.

Mrs: I didn't get it.

JL: Well you probably will get it tomorrow, explaining everything, the hours, you know.

Mrs: Angel, Mr. Clark called and he wanted to see me. He wanted to see me today so I told him, you know, that I wanted to come to see you. He must have arranged it because you know, it's not a regular visiting day.

JL: Well, Clark couldn't arrange that.

Mrs: Well you know, I guess somebody called up and they said it was all right.

JL: Who the Parole Division?

Mrs: They want to talk to me.

JL: Well, you know what to do, go and talk with them.

Mrs: I only worry about you, honey, the way you look so bad.

JL: Yeh, but I feel good. Listen, get that thing to Sandy, you know. You keep the other one.

Mrs: OK dear. Listen, Sylvester's outside.

JL: Is he?

Mrs: He will see you.

JL: Well, all right, I'll explain everything to him, you know.

Mrs: Yes because this isn't an attorney's room, will he have to see you here?

JL: No.

Mrs: I'm afraid so.

JL: Well look now, keep your chin up. I don't think—I don't know, you see what it is now, them God Damn cards I left in my drawer and all that, but it's all right, it's truth. They know it's truth and all of them that you had in there.

Mrs: That's all there was in there—from corsetiers, dress shops and—

{fol. 306] JL: Well the only thing is you know, after all you bought the home yourself. The only thing is now, you see, when I was paying Mamma, Mamma used to give me the money, you know what I mean?

Mrs: Is that what they're questioning you about?

JL: Yeh and remember I kept that list in order of what Mamma used to give me to pay her bills?

Mrs: Yes, but Joe what were they looking for?

JL: They were looking probably to see if I was having any phone numbers of any known characters or something like that, that's all it is.

Mrs: The way they were looking, I didn't know what they were looking for.

JL: Well that's what it was. And, of course, that money, well that was your vacation money.

Mrs: I told them that.

JL: Yeh, well you go down there and you know what to do. Did you see my brother?

Mrs: Sylvester did and Sylvester says I shouldn't talk to them, because I had to go to the doctors yesterday, you know, I was so upset, and the doctor says he wants me to go into the hospital for x-rays for an inflamed gall bladder.

JL: You?

Mrs: Yes, this damn thing upset me so—

JL: I know you did, that's why I wrote you this morning to keep your chin up.

Mrs: The shock to the nerves is the worse thing in the world.

JL: Yeh, I know, look, I wrote you this morning and I'm only hopin that you don't get upset. Now look,

Mrs: I was gonna go down this afternoon and talk with them by Syl says no, and the doctor says, tell them to call me, I want you to go into the hospital. I says, I can't do that, I says, for Gods sake—

JL: Look, don't you think it's best for you to go down and talk to them? Clark says come down there.

Mrs: I think so, but Syl says I shouldn't do it if I'm upset.

JL: Well, you could have the doctor call up Clark and tell him listen, Mrs. L. is very sick and please don't exert her too much, and then go, and tell him, Mr. Clark, I want to rush this thing for my husband as soon as possible.

Mrs: Did they tell you that too, that they don't let you out till they talk to me?

JL: No, you see what they're lookin to do, they want to see what all these cards and names are; that's all that is, and then that Dolly Turner, you know what that is, don't you see? The night I went out with [fol. 307] Dolly—not with Dolly—one night I went out with Sam—uh—Lou Berg, and I rant into Dolly Turner. She says, hello to us at the—at the Latin Quarter, and they took a picture. Lou Berg had a couple of girls—that's what it is. They showed it to me when I came in, see, when they put me in here—so I says, sure, I says, I don't deny that.

Mrs: Now Joe,

- JL: Well, wait a minute, let's stand on the facts now and you'll see, they probably will show it to you. That's why I don't want you to be upset about it, do you understand? So you see, if anybody says hello to you, I only says hello to her and that was all. I says, she's a good friend of Lou Berg's, now—also, don't, you see that picture, I don't know what it was. It might have been eight months ago, ten months ago, don't go back, and tell Lou Berg if they want to talk to him, that when they come up to see him, if they want to talk to Lou Berg, tell Lou that he doesn't know when the picture was taken. He don't know when it was taken. I don't know myself, because I was up there with you a couple of times. You can tell that to Clark, say I been up there with my husband a couple of times, which is the truth. Remember we went up to see May West and another time to see—and eh that's all. The truth ain't gonna hurt you, but the only thing that I can see is you got a card, a Christmas card from some Gross or someone—
- Mrs: I don't know him, you don't know him yourself.
- JL: Well yes, that's the fellow I was in Auburn—he probably sent me a card.
- Mrs: Well that's not your fault, if somebody sends you a card.
- JL: That's like I say, that's nothin, yeh, but what did you do, drive Syl up?
- Mrs: Yes.
- JL: Well that's all.
- Mrs: Well what did she do, she sat at the table with you then?
- JL: While they were taking the picture, that's all. She said, she sat there, and that was all, and then I came home.
- Mrs: Who wanted the picture taken?

JL: Lou Berg wanted it—what harm—she accidentally happened to take it—

Mrs: How many were there in the party?

JL: There was me, Lou Berg was there and two girls, and then she had a friend or someone came over and said hello, and while the picture was being taken, that's how she got into the picture but she left right away—eh

Mrs: What a pitiful thing to have to go back for a thing like her

[fol. 308] JL: Let's anything—now listen to me, you know how careful I've been, walked the chalk line

Mrs: Well that's it you can't hurt anybody's feelings but it's too late now to say I told you so.

JL: That's right. Now listen, when you see him tomorrow, say you know, I know my husband, he never hurt nobody's feelings, he'll talk—

Mrs: I told Syl about the time she came to the table in the Villa Nova, and in the ladies room I gave her my phone number—

JL: I wouldn't even talk about that. Don't you talk about it.

Mrs: Well I mean that—you know me that I—well I was going to tell her then not to be coming over to you—

JL: Well you met her and you gave her the phone number, you know met her before I went away, you know. That's the answer, you see what I mean?

Mrs: Yes, and that's only the truth. How could we miss knowing her.

JL: Well that's what I say. You see, I think you told me you gave her our number.

Mrs: I did at the Villa Nova, and that she was not to come near you in a restaurant like that. Did she ever call?

JL: Yeh, well all right, you're telling the truth, and then them cards, you know, those cards that don't mean nothin, you know what they are, they don't mean nothin.

Mrs: Well we got it straight, and you think I should go down there and talk to them.

JL: Well sure, if they want you to go down there, talk to them. I think he wants to know about the expense sheet, and you know, the house. Well say, Mr. Clark now—

Mrs: Well I can

JL: Yeh, he probably wants to know about that and you will have to explain that to him, you see, and then he wants to know about that item of Mamma's hospital—well, I'll explain that, you didn't see that, I had that in my drawer, and that's all. Because what he seen—

Mrs: Well I can talk to Mr. Clark, everybody's doing everything they possibly can.

JL: Yeh, you can explain that to him, you see, I know everybody's doing everything. Is Harry back?

Mrs: Yes. Harry, the Duke, everybody.

JL: What's new. Well, don't you worry about this thing.

Mrs: No, I am worried about you. That picture, if you have to go through another year for that thing.

[fol. 309] JL: Listen, Ellen, I wrote to you I told you to expect the worst, and if I'm expectin the worst, I'm gonna get the best, I hope.

Mrs: Are you, and I thought that Clark was such a nice guy.

JL: Listen, this is not his fault—

Mrs: It was like the Gestapo—the way they came in

JL: Well true, but listen, that's nothin, that's their duty, that's their job,

Mrs: Did they take the cuffs off, like he promised me?

JL: Yeh, he took them off me.

Mrs: Where in the car?

JL: When we got into the car. Nobody knew anything in the house. He was very good, they are very good, the only thing is you see, when I found out, when they took me up, he told me the whole story, you see what it was—that hoozit, she got arrested and she had this picture in her room, and that's how I become involved—that's how it was.

Mrs: You mean—

JL: Oh yes, you know me—hello—how are you—

Mrs: You know you never—you know, she's a tramp.

JL: I know, I know, but Ellen, I never, I didn't go up there with her. She was there with some girls, and walked over and said hello to me, and Lou Berg.

Mrs: Well suppose something happens on this, when you have been going to bed about eight or nine o'clock at night. When did it happen?

JL: Listen, it was about a year ago, and they mentioned the time, I don't know it was about a year ago, I don't know—and Lou, he doesn't remember when it was. I don't remember either, but don't let him deny that he knows her, Lou Berg, you know, and she goes over and says hello that was it, and then she went on—

Mrs: Well—

JL: Now look, if there is anything you need, you know where to go, you know—Harry.

Mrs: Oh, Frank, you know, I had dinner with him last night.

JL: Oh

Mrs: He said to tell you that if there's anything he can do—anything—and he told me whatever he can do, he wants to do, . . .

JL: Well, it's nice anyhow.

Mrs: He just felt terrible—and I said we didn't want anybody to know, but of course they do now, but I didn't want them calling the house.

[fol. 310] JL: Listen, was my brother around?—Workin'?

Mrs: Yes, yes

JL: Oh—well, anyhow you keep your chin up. That's all I'm worried about that you will get sick on me now. Maybe this happened, you know, because you shouldn't have went to Jamaica.

Mrs: Listen, I went into the bank, the safe deposit man and he told me, I'd be home in forty-eight hours and I thought well, I'll go and get my birth certificate, and I made the man come down to see that I only took it out, but you know that I had that money in there. And I took out my birth certificate and he says to me, why don't you take it all out, and I had to tell him the story, you know, I said, No, they're liable to and I don't know the way they were searching, I said, I don't know whether they were looking for stolen jewelry or what—honestly, they acted like that.

JL: Well, you know when they workin on something like that

(Silence)

Mrs: I know, I know. Jerome—you know—I was . . . and he came right up and we had to throw the windows up, you know, that fish place, the smell—I told him that they found all the checks and he didn't need to worry and I said that you had made them all good

PL: Did you give them back to him?

Mrs: I didn't give them back—I didn't know if I should, but I suppose it's OK, I was going to give them to him after you gave him the money, but I

JL: Yeh—give it to him

(Whisper)

JL: Well all right, you know, you been working there for seven years or eight years?

Mrs: Yes, since you're home.

JL: A couple of years before that

Mrs: Of course

JL: Look, well, did Harry

Mrs: That's what Harry said, he said they're not going to ask you anything about your finances, or anything about your business at all.

JL: That's probably what it is, you see they probably want to know where the source of money, you know. You see, a lot of it is the house that you bought, see?

Mrs: I know, but if they're not going to ask me those things, why did they take those things. I told them those were my things.

[fol. 311] JL: Well they only took the receipt of the house, they didn't take the expenses or anything

Mrs: The tax, Joe, they took the tax bill.

JL: Well, that's all.

Mrs: They took the bills for repairs.

JL: Well, don't (whisper) They didn't take them, they gave en back to you.

Mrs: No they didn't—everything

(Whisper)

JL: Well we'll see. That's the only thing. I guess Clark is coming up to see me here.

Mrs: I don't know. I told him I have to go and see Joe, and he said, all right, when I do that, to call him

and make an appointment. But Syl is upsetting me because he don't think I should even go and see him.

JL: Well, look, Ellen, I know Syl, but you know what you should do, I think you should.

Mrs: Well all right, you talk to Syl, you teli Syl what you want me to do. I told Syl about my health, about getting nervous and all

JL: That's right. Is gonna come up?

Mrs: They can't. Syl says something about the Warden saying only twice a week.

JL: Yeh, Wednesdays and Fridays.

JL: And two of youse can get in at a time.

Mrs: The way you have to visit up here.

JL: Now listen—(Whisper)

Mrs: But there's no problem there—you remember when I came up I told you that some woman parole officer had been up and questioned me—she wanted me to get a cheaper apartment and I said I'm getting a more expensive one.

JL: Well I think the sooner you go to see Clark the better it is and get this over with, you know, whether they're gonna send me back or let me out, of course, I'd rather get it over because I hate to lay here a month or two months.

Mrs: Well tell that to Syl. This way they make up their minds

Mrs: That's right—your brother-in-law, you know, they don't want me to see Clark.

JL: They don't want you to see him?

Mrs: No, not any of them.

[fol. 312] JL: Well I don't know, I think you should, that's my opinion, because that's the only thing they

want to clear up is how we're living, so you know. Well, we are earning only \$150, \$160 a week.

Mrs: Years ago, my God, there's no secret that I lived for thirteen years and you know I was going to the bank to put the money in—so

JL: Well now listen, why my mother gave me money. I had it, now there's nothin to worry about—honestly and truthfully I think, the truth is I'll talk to Syl, and I think the sooner you go the better because if you don't go, I'll be here one or two months.

Mrs: That's what I said—eventually I'll have to see them.

JL: That's right, that's the only thing.

Mrs: It's a natural thing for them to come to the conclusions, I don't see how I can miss, when somebody has spent about \$25,000, they want to know where it came from.

JL: Well you still owe a lot of that to them—

Mrs: No, not too much. I don't have too much left in the box, but I paid most of it up.

JL: Well all right, then you know what—you know that score, you know what you can handle.

Mrs: Well that may be what it is—you know, that association is what it's over with you. Maybe nothing will help. If I thought they wanted to know my business and it wasn't going to help you, so I'd tell them to go to Hell. If it wasn't going to help, its none of their business, how much money I had.

JL: No, that's true, but I think it's the association. No, listen you know, he likes to come home every night, sit around

Mrs: I know that, you don't have to tell me

JL: And the other things—listen, keep your chin up and that's all. If they're gonna send me back—well

Mrs: You know what, I think when they were searching I think they must have thought you were with her

JL: That's all.

Mrs: Sylvester told me that they found a whole lot of stuff in her box

JL: Hello

SC: The warden— The warden was kind enough to let me come in just a few minutes, then I'll see you alone.

Mrs: I'll get out.

(Laughter—unintelligible remarks)

Mrs: Well what kind of a way is this for a wife to kiss her husband.

[fol. 313] SC: I'm gonna see you after she gets finished but he thought maybe the three of us might want to say a few words.

Mrs: Joe wants me . . .

SC: He's a pretty nice fella.

Mrs: Joe wants me to see them and get it over with. They may charge the picture too. They got the picture.

SC: Let him rest and mind his business. We will take care of it now, after I get through talking.

Mrs: I know but Joe's right . . . may stay here four or five months before they—

SC: Look when I get through talking to you, you'll change your mind.

Mrs: Listen, Lou Berg at the Latin Quarter . . .

SC: So what, don't worry about it.

JL: Yeh, that's all it was, they showed me the picture.

SC: All right, I'll talk to you, this is just a . . .

Mrs: All right, well look Angel, I'm going to let you talk to Syl.

JL: Well I'm gonna go out with him.

SC: Yeah, Yeah.

Mrs: If you want to, then I'll get out. There's nothing more. Don't worry about me.

JL: You keep your chin up that's all.

Mrs: I went to the doctor and he gave me something to take and I feel real good today . . . Don't worry about anything.

SC: I'll talk to you.

Mrs: I can account for the cash.

(Unidentified): Sh—Sh.

Mrs: Did you, did you have any money . . .

JL: Yeah I have money here.

SC: I'll talk to you.

Mrs: Yes. All right, Angel, keep well. You wrote me a letter you said?

JL: What?

Mrs: You wrote me a letter?

JL: Yeah, I wrote you a letter . . . outside . . . o'clock.

Mrs: All right, Angel, keep well.

(For the next 45 seconds there is no conversation, only background noises. Then comes the following conversation between Joseph Lanza and Sylvester Cosentino:)

[fol. 314] SC: Now, listen.

JL: What?

SC: Harry was in to see me yesterday—eh—we've been working.

JL: Yeah.

SC: Saw the little fella.

JL: Yeah

SC: The little fella saw the guy with the glasses.

JL: Yeah.

SC: Fitzgerald's been working. They've been getting in touch with those kinds of people; know what I mean?

JL: Yeah

SC: Up state, downstate, and everywhere.

JL: Well, one signed for me to get picked up you know.

SC: What—which one, do you know?

(Sound of door, followed by distant voice.)

JL: Yeah, me. Thanks very much.

(Background noises for five seconds.)

(End.)

[fol. 315]

Transcript of conversation between JOSEPH LANZA
and HARRY LANZA on February 13, 1957, at West-
chester County Jail.

H: How do you feel?

J: Good.

H: (It is not good here. I don't like it.)*

J: I know.

H: (This is special for me.)*

J: What?

H: (This is special for me.)*

J: No. (When they were here)—understand—(some-
one told me—when the two of them—they can hear
—they're not here it is good . . .)*

H: They didn't want to let me come in you know.

J: Why?

H: I hadda get permission.

J: Well, that's the rule here. When you're in you have
to call up the Parole Commission.

H: From now on, if I want to come here I gotta get
permission from them, see?

J: Yes, that's right. (Whispering—unintelligible.)

J: There's a lotta bells ringin; No?

H: Yeah.

J: And looks very good, No?

H: Well, look you know (I can't talk to you good here.
I can't say what I know . . . mostly because of them)*

J: Well, you know what happened, don't you? They
were up to the house and eh—how about the date
and everything? Understand?

* Bracketed words are in Italian.

H: I'm up to date ~~with~~ everything.

J: OK (Anna is in the hospital.)*

H: Understand?

J: Yeh.

H: Because they wanted to speed up the thing, you know, and wanted to get a chance.

(Silence.)

J: Yes, that's right—its all right working good, you know what I mean?

H: I don't think the violation is too serious, you know.

J: Well, anyhow—(I could ask you the questions; you just answer me.)* You see, they were here. They were here Saturday. They got a lot of cards. You know, I used to meet a lot of people out of the street [fol. 316] that I know— Hello, How are you— You know they give me their cards. Some of the fellows I probably knew from years ago and some of the fellow I probably used to know from prison— well, they give me their cards, and you know, I used to keep them in the desk. They got all that stuff and then they got a lot of names with numbers like—

H: (I understand.)*

J: Like, uh, Louie the Jew and this and that, and I used to, well there was one \$14 and one \$15—well, I'd meet them and give them \$14 or \$15 to play a number. They wanted to know what they was and I says, What the hell does that mean; that don't mean nothin. Then they was also, you know, Jeanie Reardon—used to come up to see me?

H: Yeh.

J: They wanted to know if this was Gene Reardon, the cop, and I says, No this fellow Reardon is on numbers. And you know Sister Ann gave me the slip

* Bracketed words are in Italian.

. . . what she was paying Mom's hospital bill, you know one night I had that and I threw it in the drawer. You know, she wanted to let me know what she was paying. And they asked me about that, and I says, my sister made a memorandum showing me that Mamma was payin while she was in the hospital.

They also asked me if I had money and I said, sure I had money, My mother had money. I could have money any time I want, understand, I says. I had money before I went away. I says, What the hell is all this about I says. I says, This is not fair.

Then they started showin me the picture—the picture that they showed me that I took I don't know, maybe 7 months ago, 8 months ago, 9 months ago, up there. And they showed me it and I says, Yes, I says, I ran into her, this friend of mine, Mr. Berg and I went up there and had dinner with them, and she came over and said Hello. I said Hello, Mr. Berg said Hello and she went about her business, and I went about my business. I knew her before I went away, understand? So, one parole officer said, Yes that's right; that's what she said. But he said when was the picture taken and I said, I don't know when the picture was taken. So he says to me, that's right, she doesn't know when the picture was taken. I says, it could have been nine months ago, eleven months ago.

So I says, I don't know because I have been up there several times with my wife and my family—with my sisters, you know. And so forth and so on, So they says, Well that's right too, you know.

So also they says, Well you been around to Louie Hood's and I says, Yes, I've been around there. He's a friend of mine, I knew him since he's a boy and I go in there to stop by and say hello, when I go to see my mother or my sisters, you know. Also—and that was all—just about all.

Now, that's all the questioning they give me Saturday, you see. Oh, also about the house and I says, Look I have nothing to do with that. I says, That's my wife's; that belongs to her. She bought that. She's had money before.

And they also tried to make the job—you know—the job that I had. I said, That job is as honest as any job living. I says, I have been workin there. I says, I solicit business for the place. They went along with that. Understand?

[fol. 317] Now, I says, Let me tell you somethin, my reports are very good; I says, and if Mr. Tropp ever thought for one minute that that job or anything that I was doin—I says, he would have my ass back in prison long ago. And they agreed! You know, the parole guys that questioned me—the three of them. They agreed with that.

But what the hell I says—what the hell is it all about? So they . . . me into the fishin expedition. Well, I says, What the hell is this a fishing expedition? What the hell, and they came up there one night and took me to the vault. Look, I says, That is not my vault. That belongs to my wife and I says, If anything should happen to my wife, I says, she has got me down so I can—you know, I got my insurance papers and she has her. So, you know, Ellen had a little money in there too, of her own, you know what I mean.

And that's all. Well, the whole thing is so fouled up that they seem to think—Look, I says, we have about \$150 to \$160 a week between my wife and I. I says, For God sakes, we can get by on that very nicely, do you understand? And then they asked me about Nick, you know. Well, Nick, I says, is my friend and you know, he always used to come up to see me, and so forth. That's all on record, I says. Now, Look, I says, if you people—Look,—I have made four or five requests for various jobs, various businesses,

and they also got the bill of sale that Ellen bought the car from what's his name—over in—you know. They got the bill. Well, I says, that's my wife's. They also had you on record. You remember, when I wanted to go into the eh—business with you? I says, Now they denied that request and they also denied the job that I made in the newspaper union. You know, they got my union card and they got all the receipts, which is all right, you know. That is everything. That's part of being up there. You know what it is, Harry, one little thing—like I scribble a number. I'd put it in there. I'd scribble another number or an address. And there was a bunch of cards guys would give me who is in the jewelry business—a lawyer—real estate—which they misconstrued, that I can't help it. And they also misconstrued the living . . . And I told them, I said, you guys know that I only pay \$100. And they told me after they got through, the parole officers, they says, This is beyond us, it's all up in the front office. And, I'll tell you, Mr. Clark was very nice. He's my parole officer. He was very nice about the whole situation. He says, You know, He says, I know you have been on the up and up, he says, I come down here and I found you on the job and everything like that, and when you weren't there, you were out trying to get business for the firm. And he says, This is beyond me, it's Dwyer and Doud.

H: Doud, eh—Doud nothin, it's Dwyer that's everything.

J: Yeh, well, he told me, Mr. Clark told me that. He says, This is Mr. Dwyer, and he says, They wanted to know. I think he told me the Commissioner was Mr. Hirsch or somebody, who signed the paper. And he says, They got the warrant for my arrest. And I says, Jesus, did you have to come up to my house and scare my wife. And Ellen was leavin the following day. She was going away on doctor's orders for a couple of days, you know what I mean, I mean

a couple of weeks, and then she was going to visit her brother. And I says, That's all that is—there is nothin to it.

Now that's the whole picture and the whole God damn thing. There really is nothin. I mean it. The only thing about them is if they misconstrue. Who knows the theories they work on? As far as we are concerned, and they even admit it themselves, they said, We got nothin here. We're fishin, and that's [fol. 318] the way it stands up until now.

H: What are they workin on? (The book with the telephone numbers?)*

J: Well, what the hell is that? That's nothin. I mean, they got phone numbers, but what the hell are phone numbers. I got a million of them—could meet a million people who could give them to me.

H: Well, we understand that.

J: But the question is, are they goona understand that?

H: That's the answer.

J: The answer is only one thing here.

H: (The house, the house.)*

J: That's all it is, and nothin else. Yeh, because you see, Ellen has an itemized list.

H: I know that.

J: Well, all right, she has her own money.

H: She (she, she)*—Well, she has been very sick, you know that. And they have been lookin to question her in the worst way. And the poor girl is very very nervous—and the doctor ordered her in the hospital and she has been takin sedatives.

J: Well, why don't my parole officer go up there and question her?

* Bracketed words are in Italian.

- H: Understand, the poor girl is laying in the hospital and the Doc figures about four or five days, she's gonna be all right, you know.
- J: (That the only thing.)*
- H: (She is the scarey type.)*
- J: If she's gonna be sick—let me say this and I mean it all sincerely—honest I do—tell 'em to go jump in the lake. You know she's the nervous type.
- H: No . . . I know she's nervous. But 4 or 5 days . . .
- J: She don't have to go down there. She don't have to do anything of the kind. Honestly, the way I feel right now. The way I got kicked around, the way they treated me, what they did to me, believe me, I'd sooner go up and do my eleven months and get it over with. I don't know, that's exactly how I feel.
- H: I know how you feel, but if they're investigatin and find the truth, then what the hell can they do to you?
- J: Look the truth is the truth. Now Harry, there's characters there.
- H: I understand that but—
- J: Look, Harry, I'm the fellow that I am. I wouldn't ignore nobody. I told them that. I had that agreement with Mr. Tropp. I says, Mr. Tropp was my parole officer, and I had that agreement time and again with him, and he has told me, it's all right, all right, you can go if you meet them out in a restaurant or on the street, you can talk with them; you can do what you want, and so forth and so on, and [fol. 319] that's all. I says, I've had that understanding with my people. I says, Then how come, all of a sudden, I says, and where was the Parole Board all this five and a half years that I got all good reports? They admit, this is Mr. Clark, admits, he says, You have very very good reports. You see what I mean?

* Bracketed words are in Italian.

H: Yeh. You're right . . .

J: And, he says, your reports are very good and then I said, What is all this nonsense about? All these numbers and names and this and that? And I says, it don't mean nothin. I says, you got a list of names—it happened to be a name of Angel and uh—some Jewish boy's name. I remember when I was in the neighborhood, you know, I'd meet them and give them \$5 to play a number or \$14 to play a number, or, you know, things like that. I could play a number but sometimes I'd play, sometimes I don't, and I used to make a list and throw it in the desk, understand? You see what I mean? And there, that's all it was. Do you get my point now. And, they were satisfied, after they got through all the questioning. They were here almost a whole day.

They were all right. Even when they left here, I told— See, Mr. Clark didn't come because he was sick. The other two fellas was here—Lawrence and Simon. So, I says, Now look, I'm gonna make one request. I says, my wife is sick. Kindly have Mr. Clark go to the house and talk to her. I says, that's all there is to it. She can't go there. Let Mr. Clark go up and talk to her. And that's the way it is.

H: Well, we figured the—well, she's been so sick, uh, the doctor, you know, she's been throwing up, and he ordered that.

J: Well, now that's the way it is.

(Silence.)

H: (They wanted to know whether one of the big ones came. Understand?)*

J: (Well did you see him; he is sitting this week.)*

H: (Him, no. He is sitting.)* And they were trying to speed it up, understand for this week. (But he is no good.)*

* Bracketed words are in Italian.

(Silence.)

J: (Is he good?)*

H: (No.)*

J: (He is not good, that one.)*

H: (No. You know every week there is a different man, understand? But that one is no good.)*

J: I see.

H: (That one is no good. He is sitting this week and after this week he goes. Then comes Hirsch, then comes the other, the friend of ours.)*

J: (Then we are good there, no?)*

H: (Now everything—uh—only one parrot . . . parrot in three.)* . . . anything . . . the responsibility, you [fol. 320] know what I'm talking about? With the—little man

J: Oh

H: and the big man.

(Silence.)

J: Oh, very good, very good.

H: Now everything is goin' to be all right. (I know he has never been in.)* and I'm not supposed to be here, you know.

J: I see.

H: Push—you know what I mean? Good, well its not good, but I have a little confidence. You know what I mean?

J: Yeb. Well I see what you mean, but how can they do otherwise than (if they go there and they do for me . . .)*

H: Well, I understand that, but what you told me just now about you being in the Latin Quarter with your

* Bracketed words are in Italian.

friends, you know—if they go up there and make me finish . . .

J: (Up to now they're not working.)•

H: (Yes I know . . .)• up to 12 o'clock last night nothing.

J: They have not yet called them.

H: I think without it first, understand?

J: Oh.

H: See, in other words, I think they're looking to hang their hats somewhere. You know.

J: Yes. Well, I'll have to sit back, that's all.

H: That's it, relax. Now uh—Louie the Hood was in town.

J: Yeh? How is he?

H: All right. And—nothin—nothin.

J: (He is a turd; they're all turds.)•

H: Now, we sent for them other two fellas, who you sat with three weeks ago. You know what I'm talkin about?

J: Oh, Yeh, Yeh. (What did they say)•

H: ('53 they put for him.)•

J: They don't know about it, listen to what I say—Oh, yes.

H: They claim '53 positively. They know.

J: . . . No, . . . —parole— . . .

H: He don't know nothin. (No, no, he knows nothing.)•

J: He knows everything—Mr. Clark?

H: No, not from that point. You understand?

J: Well, who is takin it up from that point?

• Bracketed words are in Italian.

[fol. 321] H: Dwyer. You understand?

J: Oh!

H: But he has nothing definite. Now, positively they gave it to him in 53.

J: (They of.)*

H: Right.

J: No— Look, I know what you mean Harry, but good enough— That's fine. All right, all right.

H: (It is not written. They don't know whether its a year, one and a half years or eight months)* That's why I had them meet the other day at St. Louis . . . Positively that's the record. That's in his record.

J: Whose?

H: On Dwyer's record, it's 53.

J: Of the summer or?

H: Of the summer.

J: Well,

H: No, now listen to me. You're two friends. You gotta allow for someone to sit down like that, you know. What I mean, you can't help it if somebody comes to say Hello.

J: Listen, as far as that is concerned, that thing don't bother me.

H: Right.

J: (He has a list of 26 books)*

H: That's right, that's right. (I told the lawyer to tell you that the only thing was this here.)*

J: (Yes, we know that.)*

H: That we know. Do you understand? That's the whole clux.

* Bracketed words are in Italian.

- J: (If they send me there, they can't do anything with the time that remains.)*
- H: No, no—big—you still big man.
- J: Oh, that's right, I go along with you.
- H: That's right. That's the answer
- J: I go along with you. Now that's just exactly what you said, because they see lawyers talkin—sure, a big man.
- H: It don't mean nothin—It's the money.
- J: Yeh? Well listen—why I'm not worried.
- H: You ain't eh.
- J: No, because listen, on account of she's had money. Mamma had some of my money.
- H: Forget Mamma. You gotta good answer.
- J: Well, that's what I mean.
- [fol. 322] H: all right—
- J: Well, I'm not worried about it because, you see, Look— You see that conversation I've had with Tropp. I've spoke to him.
- H: We know that.
- J: I've spoke to him and he's even told me. He says, I know you got money. He says, I'm not gonna question you. I know your mother has got your money and I know, if you need a thousand, fifteen hundred—
- H: Three thousand. Well, she got money from O and eh—
- J: That's right. Not, it'll be after I— Well OK, all right.
- H: She got the money from O, that she saved and you never knew what she had.

* Bracketed words are in Italian.

- J:** I know that I could get anything I wanted.
- H:** She never told us till this year, and she says, she told me, I saved this money. I never had nothing. I know my husband was . . . You understand?
- J:** Well, that's her answer. I can't answer for her because furthermore, I say, she has told me that it was her money. If she don't want to talk, she don't have to go.
- H:** That we know. We know that.
- J:** What she has to do—uh—how—to get the answers. If they don't want to believe me— They believe me or they don't.
- H:** All right, in the next couple of days, we'll come up with the right answers.
- J:** Listen, in case, if you want to, if Sylvester can't come up, you know, and you want to get the other guy to come up as my lawyer, its all right too.
- H:** He can come up only by permission.
- J:** I know.
- H:** Me too.
- J:** Well, you see how they put the restrictions on you— So what? For no reason at all but— Can you imagine if I was doing anything out of the way?
- H:** They wouldn't be here.
- J:** What?
- H:** I say, if you was doin somethin bad, you won't be here.
- J:** Ah—listen, if Ellen didn't watch me and you didn't watch me and my sisters didn't watch me, and if I didn't put in my time with the family, where the hell would I be? I would have been trapped. For Christ's sake, they'd a had me back long ago—the strictest guys down there.
- H:** That's right.

J: You know what they're puzzled about? This man was a strict man that I was under for five and a half years, Mr. Tropp, and they can't deny them reports.

H: That's right.

J: They cannot even question them, because the man is a sincere man and an honest man. You know how they think. They think everybody bribes everybody. You know what I mean?

[fol. 323] H: Yes, but they go off on one theory and then they go to another theory.

J: That's right, from one theory to another. When the guys questioned me, they says—Ups! What the hell is this? It was a lot of bull shit receipts that Ellen had up there. You know, she used to pay her bills and she used to put all the receipts all in this one drawer. They even got my slips where I used to pay my income, you know, I was paying the government.

H: Yeh, I know that.

J: You see what I mean?

H: Well, we know what they've done, you know, and we know when you were there; when you went back and forth you know.

J: Yeh.

H: Either to the beach, you know—(If that one would put that one's name. He would let you go there.)^{*} Well, this man's gotta go there, gotta take a week there, understand?

J: Well, who's it up to? One man now?

H: Only one man could do it. You're a violator. See, when you're a violator, any one of the five commissioners sit there. They rotate every week, once a

^{*} Bracketed words are in Italian.

day, and when they complete their investigation, then they make a decision you know?

J: The one makes the decision?

H: That's all, one man.

(Silence.)

J: Oh, that's all right.

H: That's only on a violation. When you meet the Board you gotta have three, you know. One for decision.

J: To make me do the balance of my time, is that right?

H: Yes, that's right—that's when you go upstate.

J: When I go up to Sing Sing.

H: That's it. Now, you are under their jurisdiction but held as a possible violator, right now, is that right?

J: Yeh—and that other (turd)* That fuckin creeps on my right, (When I went down there, to talk with Luigi, I said, I didn't like, Harry, I don't like it.)• How's the kids, and Lillian, and everybody?

H: All right, everybody—

(Whisper.)

J: Who?

H: The Mayor—we brought over together (if they ask—the sister of the sick)•

J: Anne?

[fol. 324] **H:** (Yes. She'll say that she paid.)•

J: (That's a family matter)•

H: Well, seein you were the oldest one.

J: Yeh, you see when Ann showed me what she had been payin for Ma and I said, Well that's all right, and I took the slip and put it in my pocket and threw it in the drawer like all the other crap I had.

* Bracketed words are in Italian.

H: (So I'll say that she paid.)*

J: I'll tell you the truth though, if I go back on this they're gonna put their head in a shit . . .

(H. laughs.)

J: I want you to know that they're ruined.

Oh. Fine. But how come all of a sudden? (Why didn't they, didn't they, let him go.)*

H: Eh

J: Too fast, things are happening too fast you know.

H: You know what I mean. You can't just boom boom you know that. You see that's why—eh—you know what I mean?

J: Yeh—Oh, No. No.

H: You see, every day its something different. You see that's why eh—know what I mean?

J: Well, there's no beef.

H: I know that.

J: There's no beef for the simple reason that all these phone numbers—why Ellen, she has a phone book of her own too, and then they took all the Christmas cards.

H: That don't mean nothin.

J: I know that.

(Whisper.)

J: If such was the case, I'm willing to go along with you on that, but Jesus Christ, Harry, I had money before I went up.

H: Oh Yeh, I know but—all right, you know best.

J: But I mean it, you see, if there was any question—if I had money before I went up, I could have had anything I wanted out of Mamma. If I needed five thousand, ten thousand, I could's get it off Mamma

* Bracketed words are in Italian.

H: Well—

J: No, it's the truth.

H: All right, I know it's the truth.

J: Well, that's they whole damn thing. That's what I'm burned up about.

(Silence.)

[fol. 325] J: Right—what the hell else is there. Listen, years ago I used to do my own eh—you know—and when I was in need of it, Mamma give it to me. I told them that. I said, What are you talking about, this goes back to 1920. When I was the representative of the Union in 1920, I said, Get my income tax, that will show you that I used to pay on \$20,000, \$30,000, \$15,000, and I used to save a couple of thousand and give it to my mother. And in years and years Mamma piled it up. And when I came home, she says, Joe, any time you are in need of 1,000, 2,000, 5,000, 10,000, you just come and see me and I'll give it to you. She has always told me that up to the day she passed away. And she left the money with my sister. Well, what the Hell, that's the way—why I don't want my wife involved in the God Damn thing. She had a little money of her own. She worked for nine years for Christ's sake, ten years, and she has saved money.

H: We know that to be a fact. (I know that but what can we do?)*

J: But this is the worst. Did you ever see them moving pictures on television, where they kidnapped the man?

H: Yeh, they sent the other one back the following day, after you came in. Did you know that?

J: I mean it was the parole officers themselves. They admit it themselves. They says, we never seen nothin

* Bracketed words are in Italian.

like this, this is beyond us. The fellas that came and got me—there was a fella by the name of McCarthy—he's the Dick Tracy in the Parole Commission—and Lawrence and Simon. Looka how far they went. They wouldn't even trust my parole officer, but they put three more men on this assignment.

H: But no police.

J: No, just them. You know what I could have done? I could'a thrown them out of my house when they came in.

H: The way they raided the place.

J: That's right. I says to them, I don't have to go to the safe deposit box, and I didn't have to go back to my house the following night, when they didn't have nothin, and then they came up here and got me and took me to the deposit box. And I says, What the hell is this? I said, I'm cooperating with you people because my wife has asked me to go along with you people—because she can't answer for you—I don't know what you're aiming it. And I said, You people have no right to do this to me. And he says, This is beyond me. It's something that never happened in the Parole Division. I said, What the Hell. I'll answer and my wife doesn't have to answer nothin. See what I mean?

H: Well, which is the truth. She don't have to involve herself. But you got to come up with some answers.

J: No, No.

H: Now they want to see your cooperation now.

J: Well I gave it to them, Harry.

H: I understand that. You gave them answers but they want an answer from us now.

J: Well, what do you think? Do you think that

[fol. 326] H: Well it all depends now. Do you know what I mean? Of course, I don't see where you could go back as a violator. You know, as I say, these people and they put axes on your throat—I mean there is no crime that you committed or anything like that, and you wasn't even guilty of a violation of parole. You weren't guilty of no association. You can't help it if a guy gives you a card or gives you a phone number or anything like that, because they separated everything in your handwriting, you know.

J: Well a lot of it . . . when we departed, everybody told me . . .

H: (There is no one inside.)*

J: Good, very good (but there are some females. There's nothing inside. The only thing he said to me . . .)* when I was playing them numbers.

H: Yeh I know.

J: I mean for the last two or three months you know what I mean. (The way that turd was talking . . .)* Did it happen to that other/poor girl too?

H: (No,—the only thing she has at her shoulder O'Brien . . . but they never do anything like that.)*

J: Did they say anything?

H: Well that's the one that started the whole thing.

J: That's right we knew that (they are the ones who gave them the photograph.)*

H: That's right (They made her go.)* The next day after you.

J: So, my opinion is I owe them eleven months.

H: Now I can see you're very hurt, what happened to you.

J: You see what I mean? As far as I'm concerned, who wants to go through this after you keep quiet and

* Bracketed words are in Italian.

mind your business and was takin it easy—make no hullabaloo.

H: Well, you see that's my question. After six years, what the Hell is this bull shit for you've been through every agent which investigates.

J: You see, I can only tell them what I knew.

H: What kind of bull shit is this. So what, anybody could get in a picture. What the hell does it mean?

J: See what I mean? They came purposely to see if they could get a picture like that. You know, Ellen had a little gift that someone sent to her, a carving thing, you see, and the guy that happened to get that was this fellow McCarthy. And he thought it was something. I said, Hey, wait a minute. That's a gift, I says. It's a carving thing. He says, Yeh? I saw that, he says, Don't get scared, it's all right.

H: This and this

J: You know what I did? When they took me back the second time up to the house, I says, Wait a minute. You'se ain't going in there. How do I know you ain't goin to frame me. Go ahead of me and search all you want. You see, I was very cooperative one [fol. 327] hundred per cent with the parole fellows. I says, How do I know you're not going to plant something on me. They were all right. They even took off their coats, that will show you how nice they were about it, and I says, Go ahead and do what you want.

H: I think they were being fair.

J: Yeh, listen, when they go this far, Harry, What am I to think.

H: Right in your mind but—

J: Well, I said, What the Hell is this? I'm not afraid of my house. They can go through from morning till night. What the Hell are they going to get. They got a lot of Chirstmas cards that people sent to me

and a lot of God Damn addresses that people gave me—telephone numbers—even scribbling that I did. That don't mean a God Damn thing—where people might have given me things that I threw in the drawer. Things like that, and now the whole thing simmer down to what you said, and if she is sick, I wouldn't even bother.

(Silence)

J: Well as I said, this week I didn't feel good; next week I'm all right, feeling pretty good and two weeks from now I'm gonna feel better because the doctor told—the fact is you know

H: Yeh . . . (I understand because that turd is there)*

J: (Do you know who can talk to him)*

H: (Who)*

(Silence)

J: (The Irishman—he who is head of all)* prison institutions. Look I mentioned this to Brown talkin; did he tell you about that?

H: When?

J: Cause one could get an answer off him.

H: People like that didn't want you to do that.

J: What's the difference?

H: Oh no—I heard it. You know . . . didn't want it.

(Whisper)

J: Very good, very good, but if Tom—did Sylvester go and see him?

H: Yeh—good response.

J: He had good response?

H: Yeh, but It's a big story, you know.

* Bracketed words are in Italian.

J: Is Sylvester gonna come up again?

H: Yeh, I told him. He went there . . . maybe they'll grant a petition . . . he's gonna fight for that.

Maybe this week some day, you know . . .

J: Well listen—Sylvester

(Whisper)

[fol. 328] H: Well, we got time for that.

J: But the thing is he talked to them?

H: Oh sure.

J: Well that's all—just one now—the one.

H: Look, you can bet that—uh—uh—nothin's gonna happen, cause what I see the last few days, I'm tellin you, it's wonderful, and you believe what I'm tellin you.

J: Look Harry, you know me . . . OK.

H: There's nobody can't go—only them.

J: All right go ahead. I'm not gonna argue . . . No, No, as long as you got the truth, you know.

H: Because I have to be close—understand—because if I have to move a wall, I gotta do it.

J: Yes, I know but why all of a sudden is this fella . . . when they could have had one of their own, you know—one of the

(Whisper)

H: Look, there's three against—

J: All right, true enough, but here it only takes . . .

H: I understand, that's the maneuver now

(Whisper)

J: Well that's why that other fellow should be talked to.

(Long silence.)

H: Jockey.

J: Yeh.

H: Understand? Ya got a horse—he's got to jockey into position.

J: Ya bet—bet book? Foreman?

H: No, but he's the white father you know. You understand what I said. He's—uh, uh, got to jockey into position—in other words

(Silence)

H: Oh Bob you know—you understand.

J: Yeh, I see.

(Whisper)

H: And it's very good.

J: But that's why I say its important for Sylvester to see that other fellow.

H: Just look at it—

J: But if I go back, it's no good no more?

H: Well, we understand that but who says you're going back. What they got on you to send you back? You understand?

[fol. 329] J: Well if they did they'd probably—

H: Nah—I'm the boss. I'm not questionable. Can you question them? You know what I mean?

J: Well, we'll see. I see all the moves.

H: Look, it's in believing in people, you know what I mean?

J: Yes, true. I know.

H: Look I believe what I'm doin. I also believe—

J: Yes I believe in that—until it's been settled, and I can believe what I want then.

H: Well you can't be narrow.

- J: Oh no, I can't be narrow but after the decision I can believe what I want.
- H: Then—eh—it just ties up.
- J: Well if you want to put it that way.
- H: It's the only way I can put it up to this minute.
- J: Look, the reason what—I can't put it that way is the simple reason why it's only one.
- H: Right.
- J: See what I mean?
- H: That's why I'm talking about it.
- J: Had it been this then there's something new—but with—but I personally—
- H: Well, the only thing here is what I can really admire you, kid, with all his faults, is that you must admit faith in people and have faith in the parole board.
- J: Well that I have in a way but you know you hear so much talk, the way they send people back for no reason at all. There is 1500 a year goes back, and if they put me in for 11 months, I mean, if they send me back, I figure the hell with it—to finish up and they—and you'll be a free man and at least can breathe God's fresh air and do what you want. Why you even have to—why they can send guys back for going into a saloon.
- H: That we know. We know that. They're very elastic.
- J: Why a poor fellow over here, he told me. He's a guy serving here—a working fella. He's working for a concern—he drove the boss's car on the plant—on the premises—and they says, you drove the boss's car.

(Laughter).

Listen they can do whatever they want and what they think is bad—here, the facts are not bad but the way things look is bad, see?

- H: Yes the facts is not bad, what makes me think bad is because—see?
- J: All right, let's assume they think that what you said. Right? Now does that mean anything? Does that prove anything?
- [fol. 330] H: You're askin me? No, it don't mean nothing.
- J: All right, let's assume they take that attitude . . .
- H: Well, nobody knows, that's the theory we're talking about . . . You'll get . . .
- J: Well, I'm not even thinkin I'm going back. I'm thinking I'm going home.
- H: They—that's my advice, you know what I mean?
- J: Yeh, I see what you mean. Well, I'll go along with you.
- H: I'm not giving up—you know what I mean?
- J: Well, I hope Ellen gets well, that's all.
- H: Well, we hope she will be all right, that's all.
- J: Well, see what happens from now on.
- H: Look, Sylvester—does he give it to you like this?
- J: No, they have a counsel's room here, they go in there.
- H: That must be for special characters, they get in there, eh?
- J: No, they put people in there.
- H: Only when they want, eh?
- J: Well that's the way it goes.
- H: Do you need anything?
- J: When you go out there's a fruit store and you get some pears, apples and oranges.
- H: You can't, that's the rules.

J: Look, he made Ellen bring some in.

H: If its rules, all right.

J: He told me.

H: He made me read the rules on the back.

J: Yeh, you see this place is run by the Sheriff.

H: I know that.

J: He's a very nice man but there's a lot of bad guys around here.

H: How's the commissary?

J: All right.

(Silence)

H: What kind of food in the commissary, anything you want—chocolates?

J: Just chocolates and cigarettes.

(Silence)

[fol. 331] H: Yes, did you get any chocolates. You gotta buy everything through the commissary, eh? You don't smoke anyway, do you? You gotta buy everything through the commissary.

(Silence)

J: Oh yes.

(Silence)

H: In the commissary? Yeh.

(Silence)

H: (Who told you—)•

J: (I knew it)•

H: Oh, well, as long as you know what you're doing.

(Silence)

• Bracketed words are in Italian.

- J: Well, it's in here—every day he comes to see you, every day they come in and out. The food ain't too bad.
- H: Well, if I can get the stuff through. The only thing it says you know, shirts, socks—
- J: Well the last time Ellen was here, they allowed her to get Mackintosh apples, Sunkist oranges, and some pears.
- H: OK, if they allow them, because on the back of my visiting pass it says no food at all.
- J: Yeh, that's other food but fruit, they get.
- H: That's food as far as I am concerned.
- J: Well, if you can get it, because it's good like to have an apple at night, or an orange in the morning.
- H: You see—maybe next week I'll go down and see Nick you know.
- J: Well, I don't think I should be here no more than a month.
- H: Well, it figures, its gonna take—
- J: Well, I'll go along. What the Hell's the sense of bothering paying attention to what—Well to Hell with the other end of it, you know what I mean. So I figured a month anyhow.
- H: Of you figure that, right? You don't figure next week?
- J: Well, I figure a month so that way no sense in concentrating on it because I'm only gonna be—even if they send me—if they make up their mind, I'll be here a month or less, or I'll go up to Sing Sing. So what the Hell, if such is the case, I figured I'd just as soon concentrate on here, and the Hell with everything else as far as here is concerned, you know what I mean? Because they're gonna let me here about a month, I figure. Now we'll see what happens. How's Ann and Louie and everybody?

H: Everybody's all right.

J: How's the kid, all right?

H: Good.

[fol. 332] J: Did he pass?

H: Yes, they put him up for president, you know.

J: Of the Club?

H: Yeh, he declined twice, you know. Then he came second.

J: Oh, fine, and then He'll have only one more year?

H: Yeh. Now about, well, I don't want them to make it a big thing, you know.

J: They can't because they even have the itemized list, you understand?

H: Very good.

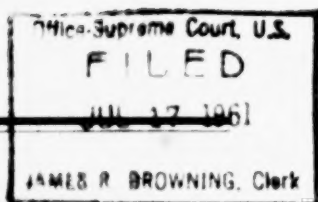
J: Yeh, that's for sure.

(Silence)

H: Take care of yourself.

J: Give my regards to everybody.

(End)



IN THE

Supreme Court of the United States

October Term, 1961

No. 236

HARRY LANZA,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK.

**PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF THE
STATE OF NEW YORK**

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**PETITION FOR A WRIT OF CERTIORARI TO
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*To the Honorable, The Chief Justice of the United States
and the Associate Justices of the Supreme Court of the
United States:*

The petitioner respectfully prays that a writ of certiorari issue to review the decision and judgment of the Court of Appeals of the State of New York (Appendix A) affirming a decision and judgment of the Appellate Division,

First Judicial Department, of the Supreme Court of the State of New York (Appendix B) which affirmed a decision and judgment of the Court of General Sessions, New York County, of the State of New York (R. 781-789, 802-822).*

Opinion Below

The Court of General Sessions rendered no formal opinion. Its oral decision is contained in the Record at folios 781-789, and its oral judgment at Record folios 802-822. The opinion of the Appellate Division of the Supreme Court of the State of New York is reported at 10 App. Div. 2d 315 and is set forth herein as Appendix B. The opinion of the Court of Appeals of the State of New York, not yet officially reported, is set forth herein as Appendix A.

Jurisdiction

The decision, judgment and remittitur of the Court of Appeals of the State of New York, the highest tribunal in the State, was entered on April 27, 1961. The remittitur was amended and the amended remittitur was entered on July 7, 1961. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257. Petitioner's cause is founded upon rights secured by the Constitution of the United States, and specifically the Fourteenth Amendment thereto.

* References are to the Record on Appeal in the New York Court of Appeals.

Question Presented

This case raises the single question whether a state may, consistent with the Fourteenth Amendment to the Federal Constitution, compel a witness before a legislative investigation committee to testify regarding information acquired by the state through the means of an electronic eavesdropping device, concealed in a room at a state penitentiary set aside for conferences between the prisoners and attorneys and relatives and where the witness conferred with his incarcerated brother.

Statement of the Facts

This case arises out of conduct on the part of officials of the State of New York that can only be described as unconscionable and reprehensible, and that has shocked the conscience of every forum—judicial, legislative and public opinion—that has had occasion to react to it.

On February 5th, 1957, Joseph Lanza, brother of the petitioner herein, was arrested on a warrant charging him with violation of parole (fol. 196). Joseph Lanza was thereupon imprisoned in the jail of Westchester County. At the request of Parole Board officers, the Sheriff of Westchester County, members of his staff, and officials in charge of the jail installed a concealed electronic microphone, connected to a recording device, in a room in the jail normally set aside for private consultations and conferences between the prisoners, their attorneys, relatives and friends. Between the period from February 5th to February 19th, a number of conversations between Joseph

Lanza and his attorney, his wife, and his brother, the petitioner herein, respectively, were thus recorded (fols. 525, 509-512, 580-581; *Lanza v. New York State Joint Legislative Committee*, 3 N. Y. 2d 92, 101; Report of the Joint Legislative Committee on Privacy of Communications, Legislative Document (1958) No. 9, 99, 24-25). Specifically involved in this case is the recorded conversation between Joseph Lanza and the petitioner herein held on February 13th, 1958 (fol. 22).

On or about February 19th, 1957, Joseph Lanza was restored to parole by Decision of James Stone, a member of the Parole Board (fol. 198). This action by Commissioner Stone gave rise to an investigation by the Joint Legislative Committee on Government Operations (hereinafter referred to as the Joint Committee) (fols. 195-200, 264-273). The Joint Committee was originally created by a resolution of both houses of the Legislature in 1955. Its existence was thereafter extended from year to year and its powers broadened by action of the Legislature (fols. 150-153).

Transcripts of the recorded conversations between Joseph Lanza and his wife, attorney and brother came into the possession of the Joint Committee and each of the four of them was summoned to appear before the Committee for questioning. All four refused to answer questions put to them by counsel for the Committee arising out of the intercepted conversations. No punitive action was taken against either Joseph Lanza or his wife. An effort was made to adjudicate the attorney guilty of contempt but the New York Appellate Division affirmed a lower court decision holding that the attorney was not guilty of contempt in his refusal to answer the questions (*Matter of Reuter (Cosentino)*, 4 A. D. 2d 252, 164 N. Y. S. 2d 534).

Harry Lanza, the petitioner herein, was called before the Joint Committee for questioning on three occasions. The first was in executive session, the second at a public session (fol. 559). In the course of the second session, the Joint Committee voted that proceedings to punish him for contempt be instituted against him (fols. 283-289, 573-579). Thereafter, on June 19, 1957, he was again called before the Joint Committee and nineteen questions were put to him, all of which he refused to answer (fols. 282-321).

The Joint Committee voted to grant immunity to the petitioner, but (on advice of his counsel) the petitioner persisted in his refusal. The petitioner was thereafter indicted for nineteen violations of Section 1330 of the New York Penal Law (refusal to testify before a legislative committee) and, after a trial without a jury, was found guilty on all counts. He was sentenced to imprisonment for one year on each of the counts, but nine of the sentences were ordered to be served concurrently with the other ten, which were ordered to be served consecutively, so that the net term for which petitioner was sentenced was ten years (fols. 806-817), a sentence modified by the Appellate Division to run concurrently, and as so modified was affirmed. The Court of Appeals, the State's highest court, affirmed the conviction by a bare majority vote of four to three.

The Manner in Which the Federal Question is Raised

The Federal question raised in this case was presented to the New York Appellate Division in petitioner's brief before that Court (pp. 27-35), at the oral argument before that Court, in petitioner's brief before the New York Court of Appeals (pp. 26-33), and in oral argument before that

Court. In each case the Court considered the Federal question and determined that no Federal right of the petitioner had been infringed.

Reasons for Issuance of the Writ

We submit that the Court of Appeals decided a substantial question regarding the Federal Constitution in a manner not in accord with the applicable decisions of this Court. We urge (1) that the question is of substantial and general importance, and (2) that it was decided erroneously by the Court below.

1. *The decision below raises a Federal question of substance and general importance.*

This case represents the first instance in which there has been presented to this Court the question of the constitutional power of a state to use information acquired through an electronic eavesdropping device secreted in a room in a jail which the state impliedly represented could be safely used by prisoners to confer with their counsel, relatives and friends.

The proliferation of the use of electronic eavesdropping devices, vividly described by the Court as "frightening paraphernalia which the vaunted marvels of an electronic age may visit upon human society" (*Silverman v. U. S.*, 81 S. Ct. 679, 681 (1961)), is a matter of common knowledge. Even in the absence of other circumstances, their use by Federal law enforcement officials was condemned by this Court as a violation of the Fourth Amendment (*ibid.*).

When combined with the entrapment¹ present in the instant case, the consequences are even more frightening.

The consequences of such conduct on the part of law enforcement officials—if the judgment of the New York Court of Appeals is allowed to stand—can be gauged by a report that after the incident at the Westchester County jail became public, a New York judge found it necessary to release a prisoner held without bail so that he would have an opportunity to consult with his attorney, since the judge could not be sure that there was any jail in the state where the prisoner could feel secure against electronic eavesdropping. (New York Times, June 26, 1957, p. 64, col. 1, cited in Comment; “Abolition of Eavesdropping Exception to the Attorney-Client Privilege,” 27 Fordham Law Review 390 (1958).)

If the decision of the Court below is permitted to stand, it may be assumed that prosecuting officials in other states will follow the lead of New York and that electronic eavesdropping devices, or “bugging” traps, may become established practice in consultation rooms of state penitentiaries.

2. *The Court of Appeals decided the Federal question in a way not in accord with the applicable decisions of this Court.*

The action of the state officials in causing the conversations between Joseph Lanza and his wife, brother and attorney to be electronically intercepted and recorded in the Westchester County jail was immoral and reprehensible. There is hardly a forum which has reacted to it that has not been shocked by it and has not condemned it.

1. The Chairman of the New York Joint Legislative Committee on Privacy of Communications stated that “at the request of Parole Board Officers, a ‘bugging’ trap was set for Lanza and his family.” N. Y. Legislative Document (1958) No. 9, p. 24.

The New York Appellate Division, in its opinion of affirmance, termed the action as "reprehensible and offensive" (fol. 885). Earlier it had called the action "gross and inexcusable" (*Lanza v. New York State Joint Legislative Committee*, 3 A. D. 2d 531), and "flagrant and unprecedented" (*Matter of Reuter (Cosentino)*, 4 A. D. 2d 252, 255, 164 N. Y. S. 2d 534). The Court of Appeals characterized it as a "gross wrong" (*Lanza v. New York State Joint Legislative Committee*, 3 N. Y. 2d 92, 101). The counsel for the Joint Committee made no effort to justify or even excuse the action, but on the contrary himself called it "repulsive and repugnant" (*ibid.*). The Governor of New York called it "unwholesome and dangerous" (McKinney's 1958 Session Laws of New York, p. 1875). The Chairman of the New York Joint Legislative Committee on Privacy of Communications called the incident "deplorable" and reported that it had "brought forth a storm of protest from lawyers, some of whom had not previously been audibly concerned about . . . efforts to protect the people's right of privacy" (Report of the New York Joint Legislative Committee on Privacy of Communications, Legislative Document (1958) No. 9, p. 25).

The most striking indication of the extent and degree to which the conscience of the community was shocked by the incident at the Westchester County jail was the enactment of Article 73 of the Penal Law of New York entitled "Eavesdropping," by Chapter 881 of the Laws of 1957. This statute made it criminal offense to do what the Westchester County jail officials did.²

2. Article 73 declares "eavesdropping" to be a felony and declares that the crime is committed, *inter alia*, by one "not present during a conversation or discussion who wilfully and by means of instrument overhears or records such conversation or discussion, or who aids, authorizes, employs, procures or permits another without the consent of a party to such conversation or discussion. * * *"

Article 73 was enacted with remarkable speed after the Westchester County jail incident became known. The incident became public towards the end of February, 1957. On March 21st (before the petitioner herein was questioned by the Joint Committee), a conference was held between leaders of the Legislature and Counsel to the Governor and the text of the proposed law was agreed upon (Report of New York State Joint Legislative Committee to Study Illegal Interception of Communications, Legislative Document (1957) No. 29, p. 28). The bill was then quickly adopted by the Legislature and approved by the Governor, as Chapter 881 of the Laws of 1957 (*ibid.*, p. 34). The speed with which the statute was adopted after the incident became known—a speed which can be explained only in terms of spontaneity—attests to the deep revulsion experienced by the people of New York by reason of the incident. If, as it is generally assumed, law reflects the moral standards of the community, there can be little doubt that the people of the State of New York deemed the conduct of the jail officials to be grossly immoral.

The Legislature, reflecting the indignation of the public, left no doubt as to who was intended to be encompassed by the prohibition. In language for which we have been unable to find any precedent, the statute expressly defines the word "person" to include "any law enforcement officer." A more emphatic repudiation of the conduct of the jail officials can hardly be conceived.

It is of course true that the action of the Westchester County jail officials was not illegal or criminal when it took place. However, the fact is, if not irrelevant, certainly not determinative insofar as the Fourteenth Amendment is concerned. The entire purpose of the Amendment was to

forbid conduct that state law permitted. The Amendment would be meaningless if its mandate could be avoided by the simple process of enacting a state statute legalizing what would otherwise be a deprivation without due process. This, at least, is how this Court has consistently interpreted the Amendment. *Powell v. Alabama*, 287 U. S. 45 (1932); *Chambers v. Florida*, 309 U. S. 227 (1940); *Leyra v. Denno*, 347 U. S. 556 (1954).

In any event, whatever doubt may have existed on this score has been laid to rest by the recent decision of this Court in *Silverman v. United States*, 81 S. Ct. 679 (1961), wherein it was specifically held immaterial that the police official's acquisition of information by electronic eavesdropping did not violate either the statutory law of the Federal Communications Act or the common law of trespass.

The Court of Appeals' per curiam opinion of affirmance did not discuss the substantive issues of the case, limiting itself to the question of the correctness of the sentence. The Appellate Division, however, indicated clearly that the basis of its decision was that "Material evidence obtained by illegal means is nevertheless admissible" (fol. 885), and it may be assumed that this too was the basis of the affirmance by the majority in the Court of Appeals.

Even before the decision of this Court in *Mapp v. Ohio*, 29 U. S. Law Week 4798, this did not constitute a correct statement of the applicable Federal constitutional law as expressed by this Court. In *Rochin v. California*, 342 U. S. 165 (1952), in unanimously upsetting a state conviction based upon the use as evidence of morphine tablets forcibly removed from the defendant's stomach by means of a pump, this Court said:

“Applying these general considerations to the circumstances of the present case, we ~~are~~ are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. *This is conduct that shocks the conscience.* * * *

“It has long since ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained * * * (Due process imposes) *the general requirement that the States in their prosecutions respect certain decencies of civilized conduct*” (pp. 169-173). (Emphasis added.)

Due process of law, the Court said further in the *Rochin* case, bars use by the state of information acquired by methods that “offend the community’s sense of fair play.” The due process clause came into our constitutions as the culmination of a long struggle to impose upon government those obligations of decency and fair play that the community has the right to expect from the agency of society which fixes by the force of law the moral standards of the community. (See, *Pfeffer, The Liberties of an American*, 153-159.)

Even closer in point is the case of *Leyra v. Denno* (347 U. S. 556), a case which, we suggest, presents exactly the same issues of constitution and conscience that are found in the present case. In that case a confession was obtained in a police station through apparently sympathetic and solicitous interrogation by a psychiatrist who was introduced to the suspect by the police as a physician who was going to give him medical relief from his mental sufferings. Police officials were secreted in an adjoining room and were able by means of an electronic microphone and recording

machine (as in the present case) to listen to and record the conversation between the two. At the conclusion of the conversation, the officials immediately came into the room and, on the basis of the admissions of guilt made orally to the psychiatrist, they were able to induce the accused to sign a full confession. The Court found the fundamental facts in the case to be indistinguishable from those in the *Rochin* case, and held violative of the "due process" clause not only use of the recorded transcript of the oral conversation, but also the written confession that emanated from it.

Leyra v. Denno, we submit, is indistinguishable from the present case. In both guile and deceit were utilized. In both a relationship of trust existed. In both the immorality at the source tainted the secondary product (the signed confession in *Leyra*, the questions put to the petitioner in the present case).

Leyra v. Denno, we submit, required the reversal of the judgment of conviction in the present case. But *Mapp v. Ohio*, *supra*, certainly removes any doubt that might otherwise exist. Although not cited in the opinion of the Appellate Division, it is clear that the decision of that Court was based on *Wolf v. Colorado*, 338 U. S. 25 (1949). The New York decisions cited by the Appellate Division themselves relied upon *Wolf v. Colorado*, at least as far as the Fourteenth Amendment is concerned.

Silverman v. United States, *supra*, establishes that the conduct engaged in by the state authorities in the visitors' room at the Westchester County jail would have constituted a violation of the Fourth Amendment had it been committed by Federal authorities. *Mapp v. Ohio* makes it clear that such conduct is likewise forbidden to the states by the Fourteenth Amendment and that information obtained by

a state in violation of the Amendment may not be used by it against the consent of the person wronged by the violation. What the Court said in *Mapp v. Ohio* (29 U. S. Law Week at 4803) is particularly applicable here:

"The ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people rest. Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise. Because it is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment. Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice."

It need hardly be stressed that it is constitutionally immaterial that the information illegally acquired herein was sought to be used by a legislative committee rather than a judicial tribunal. The mandate of the Fourth and Fourteenth Amendments extends to all agencies of government. The right of privacy, that most important of rights of civilized men, is as vulnerable to invasion by legislative investigating committees as by prosecuting officials, and requires constitutional protection in the one case no less than in the other.

Nor is it material that the petitioner in the present case was offered immunity from prosecution. The issue is not whether the illegally acquired information may be used as evidence against the victim of the invasion of privacy in a criminal proceeding; if it were, the offer of immunity might be relevant. The issue is whether the government may use such information to coerce additional information from the victim. This, we submit, it may not do. As this Court said in *Silverthorne Lumber Co. v. United States*, 254 U. S. 385, 392 (1920), "The essence of a provision forbidding the acquisition of evidence in a certain way is not merely that the evidence so acquired shall not be used before the Court, *but that it shall not be used at all.*" (Emphasis added.)

Conclusion

For the reasons above stated it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

LEO PFEFFER

Attorney for the Petitioner

JACOB D. FUCHSBERG

Of Counsel

APPENDIX A

(Decision and Judgment of the Court of Appeals,
State of New York)

COURT OF APPEALS

April 27, 1961

1

No. 379

The People &c.,

*Respondent,**vs.*

Harry Lanza,

Appellant.

Judgment modified in accordance with the memorandum herein and, as so modified, affirmed. The Appellate Division having directed that the penitentiary sentences run concurrently and not consecutively and, as so modified, having affirmed the judgment of the Court of General Sessions, we direct that the judgment be further modified by finding defendant guilty of but one crime (*People v. Riela*, 7 N Y 2d 571). It is clear from the determination of the Appellate Division that the number of crimes of which the defendant was found guilty did not enter into the duration of the sentence imposed.

Appendix A

No opinion. All concur except Desmond, Ch. J., Dye and Fuld, JJ., who dissent and vote to reverse and to dismiss the indictment upon the ground that in view of the situation disclosed in *Lanza v. N. Y. S. Joint Legis. Comm.* 3 N Y 2d 92, the questions which defendant refused to answer were not "material and proper" ones within the meaning of §1330 of the Penal Law.

Amended by order of the Court of Appeals, July 7, 1961, to add the following:

Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Defendant argued that the imposition of penal sanctions for his refusal to answer certain questions deprived him of liberty without due process of law in violation of the Fourteenth Amendment. The Court of Appeals held that defendant's constitutional rights were not violated.

APPENDIX B

**(Decision and Judgment of the New York Supreme Court,
Appellate Division, First Judicial Department)**

SUPREME COURT**APPELLATE DIVISION—FIRST DEPARTMENT**

March 1960

2382

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,
against

HARRY LANZA,
Defendant-Appellant.

Appeal from a judgment of the Court of General Sessions, New York County, rendered February 20, 1958, convicting the defendant of nineteen crimes of Refusing to Testify (Penal Law, §1330), after a trial before Mullen, J. without a jury. On the basis of consecutive sentencing, the defendant received a total sentence of ten years in the Penitentiary.

McNALLY, J.:

This is an appeal from a judgment of the Court of General Sessions convicting defendant after a nonjury trial on

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19 counts of refusing to testify (Penal Law, §1330) and imposing a sentence of one year of imprisonment in the Penitentiary of the City of New York on each count. The sentences imposed are consecutive as to each of 10 counts, and the remaining sentences are required to be served concurrently with the consecutive ones.

Defendant's brother, Joseph Lanza, was arrested for violation of parole in February, 1957, and was restored to parole during the same month by a Commissioner of the State Division of Parole. In June, 1957 the Joint Legislative Committee on Government Operations of the New York State Legislature was investigating the circumstances relating to the said arrest and restoration of parole. Defendant was summoned as a witness and at a hearing held on June 19, 1957 the committee offered him immunity from any prosecution which might result from his testimony and asked him a number of questions relating to efforts on his part to obtain his brother's restoration to parole and concerning a conversation between them apparently dealing with that subject. Despite the immunity offer and the committee's directions, defendant refused to answer any and all of the questions and assigned as ground for his refusals the privilege against self-incrimination. As a result of 19 such refusals the indictment followed.

Defendant attacks the judgment on four grounds: (1) the action of the state officials in causing the conversations between defendant and his brother to be electronically intercepted and recorded in the Westchester County Jail was immoral and reprehensible; (2) the questions put to defendant were not "proper" within the purview of section 1330 of the Penal Law; (3) the People failed to prove beyond a reasonable doubt that defendant's failure to answer was wilful; and (4) he was improperly convicted of 19

Appendix B

crimes; that only a single crime is involved and only one sentence may be imposed; in any event, the sentence is excessive.

In support of defendant's first contention, he adverts to the following facts. During the days immediately after Joseph Lanza's arrest for parole violation and while he was detained in an institution known as Eastview Prison in Westchester County, he had engaged in various conversations in one of the prison rooms with the defendant, with other relatives and with an attorney; that some of the conversations had been intercepted and recorded by a concealed mechanical device placed there by certain law enforcement officials other than the legislative committee. Included among the recorded conversations was one between defendant and his brother on February 13, 1957, which was the source of the questions asked of the defendant on June 19, 1957.

The said recorded conversations have been the subject of two cases decided by this Court. In one the court refused to enjoin the present legislative committee from making public the conversation (*Lanza v. New York State Joint Legislative Committee*, 3 A D 2d 531, *aff'd* 3 N Y 2d 92); in the other it was held that the attorney was not in contempt for refusing to answer before the State Commissioner of Investigation questions stemming from the recorded confidential talk. (*Matter of Reuter (Cosentino)*, 4 A D 2d 252.) Those cases related to the attorney-client privilege and did not deal with the legality of the use of the evidence obtained by mechanical eavesdropping.

The interception and recording of the conversations had with Joseph Lanza occurred prior to the enactment of section 738 of the Penal Law and sections 813-a and 813-b of the Code of Criminal Procedure and were not then illegal. Defendant, nevertheless, argues the improprieties attend-

Appendix B

ing the interception and recording serve to make the questions propounded to the defendant improper within the meaning of the statute (Penal Law, §1330).

The materiality and propriety of any question within the scope of section 1330 is to be determined by its pertinency in the light of the subject matter of the inquiry before the committee. (*People v. Sharp*, 107 N. Y. 427, 455-456.) It is not nor can it be asserted that the questions underlying the counts herein were irrelevant on the subject matter of the committee's investigation.

It may be assumed that the interception and recording of the conversation between defendant and his brother were reprehensible and offensive. Material evidence obtained by illegal means is nevertheless admissible. (*People v. Richter's Jewelers*, 291 N. Y. 161; *People v. Defore*, 242 N. Y. 13, cert. denied 270 U. S. 657; *People v. Adams*, 176 N. Y. 351, aff'd 192 U. S. 585; *People v. Variano*, 5 N Y 2d 391, 394; *People v. Dinan*, 7 A D 2d 119, aff'd 6 N Y 2d 715.)

Defendant's reliance upon *Matter of Reuter (Cosentino)* (*supra*) and *Lanza v. New York State Legislative Committee* (*supra*) is misplaced. *Reuter* involved the privilege of attorney and client not here invoked. *Lanza* involved the same privilege and held it did not prevent publication by a third party of intercepted confidential matter passing between attorney and client.

Cases relied on by defendant involving compulsory incriminating testimony such as *Leyra v. Denno* (347 U. S. 556) and *Rochin v. California*, 342 U. S. 165) are beside the point. The constitutional privilege against self-incrimination is satisfied by statutory immunity coextensive therewith. Testimony compelled by virtue of a grant of immunity is not within the ambit of the constitutional privilege. (*People v. Sharp, supra*; *Matter of Knapp v. Schweit-*

Appendix B

zer, 2 N Y 2d 913, *aff'd* 357 U. S. 371.) The legislative committee was engaged in an investigation of matters including the detection and prevention of corrupt practices within the ambit of article 34 of the Penal Law which pertains to bribery and corruption. Section 381 thereof provides for compulsory testimony and immunity from prosecution on account of any matter or thing concerning which a witness testifies and proscribes the use of such evidence against him. The defendant was offered the immunity and thereby accorded the protection afforded by the constitutional privilege.

Defendant's reliance upon advice of counsel and his belief that he had a right to refuse to answer the questions does not preclude his conviction of the crimes here involved. Wilfulness was found by the trial court as a matter of fact and the record fully supports the finding.

We turn now to other grounds urged for reversal. Defendant argues the indictment alleges only a single crime, and, in addition, the sentence is excessive. Defendant seeks to equate his refusals to testify with a refusal to appear or a refusal to be sworn. We are not here concerned with the latter crimes. Defendant did appear and was sworn; we need not speculate on the effect of his failure to do either. Moreover, it is clear that each wilful refusal to testify on any separate subject constitutes a separate crime and will support the imposition of as many consecutive sentences as there are separate subjects. (*People v. Saperstein*, 2 N Y 2d 210.) However, we are of the opinion, in the light of the circumstances and the absence of any prior criminal record on the part of the defendant, that the total sentence imposed was excessive and that the sentences should have been made to run concurrently with each other.

Appendix B

It may well be that the refusals to testify here involved relate broadly to only two separate subjects, the defendant's efforts towards bringing about his brother's release on parole and the conversation had on February 13, 1957 between defendant and his brother. Whether thereby the defendant's 19 refusals to testify as alleged in this indictment constitute only two separate crimes or more, we do not now decide, since the conviction on any one count is sufficient to sustain the sentence as hereby modified. (*People v. Faden*, 271 N. Y. 435, 444-445.)

The judgment of conviction should be modified, on the law, on the facts and in the exercise of discretion, by directing that the Penitentiary sentences imposed are to run concurrently and not consecutively, and, as so modified, affirmed.

All Concur.

HARRY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1961

No. **236**

HARRY LANZA,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the
New York Court of Appeals

BRIEF FOR THE PEOPLE OF THE STATE OF NEW YORK IN OPPOSITION

FRANK S. HOGAN
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New York County

H. RICHARD UVILLER
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Assistant District Attorneys
Of Counsel

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IN THE
Supreme Court of the United States
October Term, 1961

No. _____

HARRY LANZA,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

**On Petition for a Writ of Certiorari to the
New York Court of Appeals**

**BRIEF FOR THE PEOPLE OF THE STATE OF
NEW YORK IN OPPOSITION**

Jurisdiction

There is serious question whether this Court has jurisdiction to grant certiorari in the instant case. The petitioner stands convicted, pursuant to the modification of the judgment by the New York Court of Appeals, of a single

crime: *viz.*, contemptuous refusal to answer a number of questions before a Joint Legislative Committee. The petitioner challenges these questions as having stemmed from what he deems to be an unconstitutional investigative procedure. Assuming, without conceding, the validity of his claim, the judgment below would be unaffected since it rests as well on questions clearly outside the challenged source.

Pertinent Provision of the United States Constitution

U. S. Constitution, Amendment 14 §1:

“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.”

Pertinent Statutes

Section 1330 of the Penal Law, upon which the indictment is based, reads as follows:

“§1330. Refusing to testify

“A person who being present before either house of the legislature or any committee thereof authorized to summon witnesses, wilfully refuses to be sworn or affirmed, or to answer any material and proper question, or to produce upon reasonable notice any material and proper books, papers, or documents in his possession or under his control, is guilty of a misdemeanor.”

The immunity provisions in the Penal Law, pursuant to which the defendant was summoned to appear as a witness, was offered immunity and was ordered to testify, are the following:

**"§381. Offender a competent witness;
witnesses' immunity.**

"1. A person who has violated any section of this chapter relating to bribery or any section of this article [Art. 34] or who has committed an attempt to violate any such section is a competent witness against another person so offending.

"2. In any criminal proceeding before any court, magistrate or grand jury, or upon any investigation before any joint legislative committee, for or relating to a violation of any section of this chapter relating to bribery or any section of this article or an attempt to commit any such violation, the court, magistrate or grand jury, or the committee may confer immunity in accordance with the provisions of section two thousand four hundred forty-seven of this chapter."

"§584. Witnesses' immunity

"In any criminal proceeding before any court, magistrate, or grand jury, or upon any investigation before any joint legislative committee for or relating to a violation of any of the provisions of this article [dealing with conspiracy], the court, magistrate or grand jury, or the committee, may confer immunity in accordance with the provisions of section two thousand four hundred forty-seven of this chapter."

“§2447. Witnesses’ immunity.

“1. In any investigation or proceeding where, by express provision of statute, a competent authority is authorized to confer immunity, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and, notwithstanding such refusal, an order is made by such competent authority that such person answer the question or produce the evidence, such person shall comply with the order. If such person complies with the order, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, then immunity shall be conferred upon him, as provided for herein.

“2. ‘Immunity’ as used in this section means that such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order by competent authority, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceeding. But he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury or contempt committed in answering, or failing to answer, or in producing or failing to produce evidence, in accordance with the order, and any such answer given or evidence produced shall be admissible against him upon any criminal proceeding concerning such perjury or contempt.

“3. ‘Competent authority’ as used in this section means:

. . .

“(d) A legislative committee or temporary state commission before which a person is called to answer questions or produce evidence in an inquiry or investigation, upon twenty-four hours prior written notice to the attorney-general of the state of New York and to

the appropriate district attorney having an official interest therein; provided that a majority of the full membership of such committee or commission concur therein;

. . .

“Provided, however, that no such authority shall be deemed a competent authority within the meaning of this section unless expressly authorized by statute to confer immunity.

“4. Immunity shall not be conferred upon any person except in accordance with the provisions of this section.

“5. If, after compliance with the provisions of this section, or any other similar provision of law, a person is ordered to answer a question or produce evidence of any other kind and complies with such order, and it is thereafter determined that the appropriate district attorney having an official interest therein was not notified, such failure or neglect shall not deprive such person of any immunity otherwise properly conferred upon him.”

Questions Presented

Does this Court have jurisdiction to grant a writ of certiorari where the petitioner's claims, even if assumed to be correct, would not affect the judgment below?

Will this Court inquire into the basis of a legislative committee's questions where adequate immunity is granted and testimony compelled?

Is eavesdropping in a prison violative of due process or the search and seizure sanctions of the United States Constitution?

Statement of the Case

On June 19, 1957, the petitioner was called before the Joint Legislative Committee on Government Operations of the Legislature of the State of New York (149),* a duly constituted state body, to be questioned concerning any knowledge that he might have pertinent to corruption in the New York State Parole Commission (267-269). The committee, after granting the petitioner immunity from prosecution (348-59), directed that he reply to a number of questions (359-402). The committee counsel formulated a majority of his questions based on information independently gathered by another state agency (467-514, 518-19). Officials at the Westchester County Jail had supplied the committee with transcripts of conversations which were obtained by use of an electronic recording device which was installed in a prison visitors' room (467-514). The petitioner was a party to some of the overheard conversations (467-514).

For failing to answer the questions pursuant to direction, the petitioner was indicted on nineteen separate counts of refusing to testify (N. Y. Penal Law §1330). Each count in the indictment was based upon a single question which the petitioner refused to answer before the committee. The trial court found the defendant guilty on each of the nineteen separate counts (789) and sentenced him to ten consecutive terms of one year each (801-820).

* References are to the folios of the N. Y. Court of Appeals record unless otherwise indicated.

The New York Supreme Court, Appellate Division, First Department, modified the judgment by directing that the terms imposed be served concurrently, and left open the question of the number of crimes committed (874-892) (petition pp. 17-23) [10 App. Div. 2d 315 (1st Dept. 1960)].

The New York Court of Appeals modified the judgment further, holding that a single crime had been committed, but that the sentence need not be altered (petition pp. 15-16).

The Appellate Division held in part [10 App. Div. 2d 315 (1st Dept. 1960)]:

"It may well be that the refusals to testify here involved relate broadly to only two separate subjects, the defendant's efforts towards bringing about his brother's release on parole and the conversation had on February 13, 1957 between defendant and his brother. Whether thereby the defendant's 19 refusals to testify as alleged in this indictment constitute only two separate crimes or more, we do not now decide, since the conviction on any one count is sufficient to sustain the sentence as hereby modified. (*People v. Faden*, 271 N. Y. 435, 444-445.)."

The Court of Appeals noted [petition p. 15]:

"The Appellate Division having directed that the penitentiary sentences run concurrently and not consecutively and, as so modified, having affirmed the judgment of the Court of General Sessions, we direct that the judgment be further modified by finding defendant guilty of but one crime (*People v. Riela*, 7 N. Y. 2d 571). It is clear from the determination of the Appellate Division that the number of crimes of which the defendant was found guilty did not enter into the duration of the sentence imposed."

POINT I

Even assuming the validity of the petitioner's argument, no constitutional question is presented.

The petitioner contends that he has been deprived of liberty without due process in that the questions which ultimately led to his conviction were based on "illegally" or "immorally" obtained information (petition, pp. 7-14).

The petitioner's argument scrupulously avoids the obvious distinction between those questions or indictment counts which were based upon the alleged "illegal" evidence and those which were not. This avoidance obfuscates the issue of jurisdiction and attempts to create a foundation for a writ where none actually exists. This distinction is actually crucial. Even if we assume that every count based upon the alleged "illegally" or "immorally" obtained information were invalid [Counts 2-18 (483-504)], the judgment would stand, for the evidence in the record conclusively establishes that Counts numbered One and Nineteen are in no way connected with the allegedly contaminated information. This is clearly revealed by the record of the petitioner's trial below, where his trial attorney cross-examined the committee counsel concerning the basis of his questions propounded to the petitioner at the committee hearing (475-481):

"Q. Now, after examining the 19 counts contained in the indictment here, can you tell me whether the data or material on which were propounded your questions were the result of information you gave or gathered from those interceptions? A. I think some of

the questions were based upon the recordings of conversations between Joseph and Harry Lanza, and other or others of them as I hastily thumbed through the indictment were not.

"Q. Can you show me one of the 19 questions which were not the result of the tapes which you had available to you? A. The first one that occurs to me and this I do not mean to infer is the only one but you asked me to show you one example, the first one I would like to refer to is the count numbered 18th [*sic.* Actually, 19th] or the last count of this indictment.

. . .

"Q. Would you read the question, Mr. Bauman, please? A. In the last count of the indictment, so there is no confusion of what I am referring to, which is numbered 18th, [*sic.* Actually, 19th] the question is specified as follows: 'Mr. Lanza, please tell the Committee the name of anyone with whom you spoke during the month of February 1957 about the restoration to parole of your brother Joseph Lanza.'

"Q. You can tell me now, Mr. Bauman, that you didn't ask that question as a result of the information that was made available to you from those tapes? A. I can.

"Q. You can say that without fear of successful contradiction, is that correct? A. Yes, I think so.

"Q. Show me one other question, Mr. Bauman? A. Well, I will start with number One.

"Q. Will you do that please? A. Yes (looking through indictment). In the first count, Mr. Drenzo?

"Q. Yes. A. The question is quoted as follows: 'On February 5th, 1957 your brother Joseph Lanza

was arrested and returned to prison charged with a violation of parole. Tell the Committee, please, any and all efforts extended by you to assist in obtaining the release of your brother Joseph Lanza on parole or his restoration to parole? Q. You say that you did not gather any material from the tapes upon which to predicate that question, Mr. Bauman? A. I have said and I say Mr. Durenzo, that that question as well as the previous one was not based upon any material in the tapes.'

"Q. You are sure about that? A. Yes."

Counts 1 and 19, which are clearly outside the petitioner's complaint, sustain the judgment as it presently stands. It has long been the law in New York that a judgment on multiple counts is supportable by any valid count thereunder, irrespective of other defective counts.

In the year 1874, the Court of Appeals, in *People v. Davis*, 56 N. Y. 95, directed these words to this issue:

"The motion in arrest of judgment was properly denied. This was based upon an alleged defect in the third count. But the verdict was general, finding the accused guilty upon all the counts. The indictment contains two counts confessedly good. It is sufficient if it contains one good count. This will sustain the conviction, irrespective of other defective counts."

In 1881 the high Court passed on the issue in *Hope v. People*, 83 N. Y. 418, in like manner.

"The sufficiency of these counts is claimed by the prosecution to be established by the case of *Brooks v. People* (49 N. Y. 436), but we do not think it material now to examine the question. In all the counts the robbery is alleged to have been committed upon

Wreckle. The first and second counts, which lay the property in him, are conceded to be good. Even if the others were bad, that would be no ground for directing an acquittal of the prisoner on the whole indictment, and an acquittal specially on the third and fourth counts would be of no importance, so long as he was convicted upon the good counts, the robbery being the same, the only difference between the counts being in the allegation of ownership.

• • •

“Nor is the conviction rendered erroneous, the verdict being general, merely by reason of there being bad counts in the indictment, provided some of the counts are good. Whether the prisoner is found guilty or acquitted on the bad counts in such a case is matter of no importance; though the bad counts describe no offense, his conviction upon the good counts is not impaired, and he would be in no better condition if the court had on the trial withdrawn the bad counts from the consideration of the jury.”

Again in 1913, the Court stated the law on this issue [*People v. Cummins*, 209 N. Y. 283 at page 296]:

“Finally, on this point, it is settled law that a conviction under a general verdict is not rendered erroneous by the presence of bad counts in an indictment provided some of the counts are good. (*Hope v. People*, 83 N. Y. 418).”

The most recent consideration of this issue by the Court of Appeals was in *People v. Faden*, 271 N. Y. 435, in 1936, when the rule was again affirmed. The Court, citing *Cummins* and *Davis*, observed the following:

"We need not take up the second count in the first information, which charged the violation of both sections 340 and 357 in separate counts, by doing business with, and making usurious loans to, the same person, because the conviction on the first count would be sufficient to sustain the judgment even if the second count were bad. (*People v. Cummins*, 209 N. Y. 283, 296; *People v. Davis*, 56 N. Y. 95, 100.)"

It is therefore clear that success in this Court on his constitutional claim could in no way affect the judgment below. *A fortiori*, he suffered no infringement of his constitutional rights by virtue of his conviction of Counts Two through Eighteen. Absent a convincing showing of actual impairment of a constitutional right, the question presently raised by the instant petition is exposed as a mere hypothetical, imaginary, and unreal issue. It is well settled by an unbroken line of authority that this Court will not assume jurisdiction by the issuance of a writ of certiorari under such circumstances [see, *e.g.*, *Cincinnati v. Vesper*, 281 U. S. 349 (1930); *Zucht v. King*, 260 U. S. 174 (1923); *Seaboard Airline Ry. Co. v. Watson*, 287 U. S. 86 (1932)].

Moreover, even assuming the jurisdiction of the Court, under expressed policy and pursuant to the reasoning above set forth, the constitutional point raised would not be reached under the circumstances of the instant petition owing to the presence of a simpler means of disposing of the case, *i.e.*, affirmance of the judgment on the unchallenged counts [see *Charles River Bridge v. Warren Bridge*, 11 Pet. 419 (1837); *Communist Party v. Subversive Activities Control Board*, 351 U. S. 115 (1955)].

POINT II

The Court of Appeals' resolution of the petitioner's claim was in conformity with the decisions of this Court.

The situation here involves a duly constituted legislative committee, representing both the Senate and Assembly of the New York Legislature, calling before it the petitioner who may have had information pertinent to one of the committee's lawful objectives. The petitioner appeared with legal counsel and declined to answer a series of questions on the grounds that the answers might tend to incriminate him [N. Y. Const., Art. I §6]. After the petitioner's refusal, he was guaranteed "full immunity" (358-9) from future prosecution for crimes exposed by his disclosures and then directed to answer (348-357). There is no claim here that the granted immunity pursuant to Sections 2447, 381, and 584 of the New York Penal Law was inadequate.

It is no longer debatable that immunity legislation, broad enough in scope to be equivalent to a constitutional privilege, may be substituted for that privilege. *Counselman v. Hitchcock*, 142 U. S. 547 (1892); *Brown v. Walker*, 161 U. S. 591 (1896).

Regan v. New York, 349 U. S. 58 (1954) held that the sole constitutional requirement in a testimonial compulsion case is that adequate immunity be granted. Indeed the instant case is more persuasive than *Regan* for here there is no issue of waiver, no possible subsequent prosecution. In light of the fact that petitioner would have been free

of future prosecution if he had testified, it is difficult to follow the petitioner's argument that immunity here is not dispositive of his claim of violation of due process.

What purpose is served or right preserved by the petitioner's contumacious conduct since he can be deprived of no right to due process of law? Whatever embarrassment to the petitioner might have been occasioned by compelling his testimony is clearly justified. Society, through its varied agencies, has the right and duty to investigate crime and corruption and to protect the community at large. Balancing of the rights of individual citizens and the rights of the community is indeed one purpose of immunity legislation. The petitioner's refusal to answer as directed thus frustrated the rightful powers of the Joint Committee. His purpose may be reasonably inferred from trial counsel's observation on sentencing (798-799) and petitioner's own exhibit (647-651, 850-851). It is clear that the petitioner attempted to protect his brother and others who were engaged in a scheme to corrupt a public official. This, of course, is not a legitimate invocation of a constitutional privilege, immunity not considered.

The petitioner attempts to avoid the conclusion of *Regan* by attacking the basis of the committee's question. Of course we need only discuss questions 2 through 18 in that as indicated in Point I the petitioner does not complain of the basis of questions 1 and 19.

The intrusion of a court into the internal information gathering procedures of a committee is inconsistent with the separation of powers concept. The limitation of the

judicial power in affecting the functions of a legislative committee is long established. *McGrain v. Dougherty*, 273 U. S. 135 (1927).

Of great significance on this issue is the court's observation in *Hearst v. Black*, 87 F. 2d 68 (D. C. Cir. 1936):

"The Constitution has lodged the legislative power exclusively in the Congress. If a court could say to the Congress that it could use or could not use information in its possession, the independence of the Legislature would be destroyed and the constitutional separation of the powers of government invaded. Nothing is better settled than that each of the three great departments of government shall be independent and not subject to be controlled directly or indirectly by either of the others."

The court in *Barsky v. United States*, 167 F. 2d 241 (D. C. Cir. 1948), stated that the remedy for legislative misconduct by committee is with the parent body or with the people:

"The remedy for unseemly conduct, if any, by Committees of Congress is for Congress, or for the people; it is political and not judicial. 'It must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.' The courts have no authority to speak or act upon the conduct by the legislative branch of its own business, so long as the bounds of power and pertinency are not exceeded, and the mere possibility that the power of inquiry may be abused 'affords no ground for denying the power.'"

Of course, there may be extreme circumstances when judicial inquiry into legislative procedures would be justi-

fied to protect an individual's constitutional rights. But that situation clearly does not exist here. Not only did the committee provide the petitioner with an adequate immunity from future prosecution, but it did not participate in the challenged eavesdropping. Moreover, the petitioner herein was not the target of the investigation.

In this connection, it may be of tangential interest that the prime subject of the eavesdropping—the brother of the petitioner—unsuccesfully applied to this Court for certiorari to review the identical matter here in issue. [*Lanza v. New York State Joint Legislative Committee*, 355 U. S. 856 (1957)]. Moreover, in that case the petitioner stood on firmer ground than does his brother herein for there it was claimed that the authorities eavesdropped on a conversation between an attorney and his client. The alleged interference with a privileged conference is, of course, a factor not present in the instant petition.

The petitioner, while avoiding the controlling issues of the case, intertwines two constitutional themes.

First, he alleges that he has been deprived of due process relying solely on *Rochin v. California*, 342 U. S. 165 (1952), and *Leyra v. Denno*, 347 U. S. 556 (1954), which he maintains are indistinguishable from the case before the Court (petition pp. 11-12).

Rochin, which involved the violent physical invasion of the defendant's person to extract morphine tablets from his stomach, and *Leyra*, which involved a coerced confession from a "physically and mentally exhausted subject" obtained by a highly skilled psychiatrist, are, as the Appellate

Division below observed, clearly not in point [10 App. Div. 2d 315 (1st Dept. 1960)]. Some of the distinctions which immediately occur to mind are, first, there is no coercion, violence or brutality involved in this case—the issue is eavesdropping, not coerced confession; second, the evidence acquired, or anything tainted by it, was never introduced in a prosecution against the petitioner; third, the petitioner was convicted of an entirely different crime than the one indicated by the overheard information; and finally, the petitioner was given immunity from prosecution.

Second, interspersed in the Fourteenth Amendment argument are references to an illegal search (petition pp. 12-13). On this issue, it is difficult to understand the petitioner's position. While initially he concedes that the eavesdropping was "not illegal or criminal," (petition p. 9), he later claims that the information was "illegally acquired" (petition p. 13). Both positions are set forth with force but unfortunately without supporting authority or reason.

As petitioner initially admits, at the time the eavesdropping occurred in this case (February 1957) it was not illegal or criminal. Electronic eavesdropping was an area where technological progress had outdistanced the law. This situation was promptly and adequately rectified in New York State by legislation effective in July, 1957. Sections 738 through 745 of the New York Penal Law put eavesdropping on a footing with wiretapping. Eavesdropping may be accomplished today only by specified law enforcement officials upon a court order or where specially justified by the exigencies of the situation (see also §§813a, 813b N. Y. Code of Crim. Proc.).

Since the eavesdropping here was legal under New York law, we need only consider whether it be a violation of the Fourth or Fourteenth Amendments.

Eavesdropping without physical intrusion into an area protected by the Fourth Amendment is not a violation of the constitutional rights of an individual [*Silverman v. United States*, 81 S. Ct. 679 (1961)]. *Silverman*, it will be recalled, is the case where "the eavesdropping was accomplished by means of an unauthorized physical penetration into the premises occupied by the petitioner." The penetration was accomplished with a spike microphone driven into the wall of a house making contact with the house's heating apparatus which served as a conductor for sound and enabled the government agents to overhear conversations taking place throughout the house. *Silverman* is not analogous here, where the record indicates (based on hearsay evidence) that the eavesdropping occurred in a State prison where one of the participants was a prisoner (465-474) who was subject to the constant supervision and observation of his jailors. No home was violated here; the eavesdropping occurred in a government building where the eavesdroppers were rightfully and lawfully present. It is clear that such conditions do not meet the *Silverman* intrusion into a protected area test.

Although the record is not clear as to where the microphone was placed in the instant case, *Goldman v. United States*, 316 U. S. 129 (1941), would seem determinative of the issues presented. In *Goldman*, the federal agents placed a detectaphone against the wall in a room adjacent to the

one in which the conversation took place. This Court admitted the eavesdropped information recognizing that the federal agents were lawfully present and had not intruded into an area protected by the Fourth Amendment.

Even if this case were controlled by *Silverman* rather than *Goldman*, the petitioner's extreme position would still fail to overcome *Hearst v. Black*, 87 F. 2d 68 (D. C. Cir. 1936), where illegally obtained evidence used by a committee was not disapproved.

The petitioner's reliance on *Mapp v. Ohio*, 367 U. S. 643 (1961), which binds the states to apply the federal evidentiary exclusion rule in illegal search and seizure cases, is utterly misplaced. The eavesdropped information here was first, legally obtained, and second, never introduced in evidence against the petitioner.

Finally, a concluding remark is demanded by the petitioner's chronicle of critical comment (petition pp. 7-9) and his extravagant expressions of horror (petition pp. 6-7). Since the adverse criticism cited by the petitioner was directed at alleged interference with the attorney-client relationship—a different issue than that involved here—and since the prophecies of doom are maintained in spite of already existing remedial legislation, these harangues may justly be characterized as sound and fury signifying nothing.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE
Supreme Court of the United States
October Term, 1961

No. 236

HARRY LANZA,
Petitioner

—v.—

NEW YORK.

**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK**

BRIEF FOR PETITIONER

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IN THE
Supreme Court of the United States
October Term, 1961

No. 236

HARRY LANZA,
Petitioner

—v.—

NEW YORK

BRIEF FOR PETITIONER

Opinions Below

The opinion of the Court of Appeals of the State of New York (R. 300)* is reported at 9 N. Y. 2d 895. The opinion of the Appellate Division of the Supreme Court of the State of New York, First Department (R. 292-298) is reported at 10 App. Div. 2d 315. The Court of General Sessions rendered no formal opinion. Its oral decision is contained in the Record at pp. 261-263 and its oral judgment at pp. 268-274.

Jurisdiction

The decision, judgment and remittitur of the Court of Appeals of the State of New York, the highest tribunal in

* References are to pages in the Transcript of Record in this Court.

the State, were entered on April 27, 1961. The remittitur was amended and the amended remittitur (R. 301) was entered on July 7, 1961. A petition for certiorari was filed with the Clerk of this Court on July 17, 1961 and certiorari was granted on November 20, 1961.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257, Petitioner's cause is founded upon rights secured by the Constitution of the United States, and specifically the Fourteenth Amendment thereto.

Constitutional Provisions Relied Upon

The Petitioner relies upon the Fourth and Fourteenth Amendments to the Federal Constitution.

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Fourteenth Amendment

Section 1 . . . nor shall any State deprive any person of life, liberty or property, without due process of law . . .

Question Presented

This case raises the single question whether a stay may, consistent with the Fourteenth Amendment to the Federal Constitution, compel a witness before a legislative investigation committee to testify regarding information acquired by the state through the means of an electronic eavesdropping device, concealed in a room at a state penitentiary set aside for conferences between the prisoners and their attorneys and relatives and where the witness conferred with his incarcerated brother.

Statement of the Case

There is no dispute as to the basic facts relevant to the question presented to this Court on this petition.

On February 5th, 1957, Joseph Lanza, brother of the petitioner, herein, was arrested on a warrant charging him with violation of parole (R. 66). Joseph Lanza was thereupon imprisoned in the jail of Westchester County, New York. At the request of New York Parole Board officers, the Sheriff of Westchester County, members of his staff, and officials in charge of the jail installed a concealed electronic microphone, connected to a recording device, in a room in the jail normally set aside for private consultations and conferences between the prisoners, their attorneys, relatives and friends. Between the period from February 5th to February 19th, a number of conversations between Joseph Lanza and his attorney, his wife, and his brother, the petitioner herein, respectively, were thus recorded (R. 175, 170-171; *Lanza v. New York State Joint Legislative Committee*, 3 N. Y. 2d 92, 101; Report of the New York Joint Legislative Committee on Privacy of Communica-

tions, Legislative Document (1958) No. 9, 99, 24-25). Specifically involved in this case is the recorded conversation between Joseph Lanza and the petitioner herein held on February 13th, 1958 (R. 8).

On or about February 19, 1957, Joseph Lanza was restored to parole by decision of James Stone, a member of the Parole Board (R. 66). This action by Commissioner Stone gave rise to an investigation by the New York Joint Legislative Committee on Government Operations (hereinafter referred to as the Joint Committee) (R. 65-67, 88-91). The Joint Committee was originally created by a resolution of both houses of the State Legislature in 1955. Its existence was thereafter broadened by action of the Legislature (R. 50-51).

Transcripts of the recorded conversations between Joseph Lanza and his wife, attorney and brother came into the possession of the Joint Committee and each of the four of them was summoned to appear before the Committee for questioning. All four refused to answer questions put to them by counsel for the Committee arising out of the intercepted conversations. No punitive action was taken against either Joseph Lanza or his wife. An effort was made to adjudicate the attorney guilty of contempt but the New York Appellate Division affirmed a lower court decision holding that the attorney was not guilty of contempt in his refusal to answer the questions (*Matter of Reuter (Consentino)*, 4 A. D. 2d 252, 164 N. Y. S. 2d 534).

Harry Lanza, the petitioner herein, was called before the Joint Committee for questioning on three occasions. The first was in executive session, the second at a public session (R. 187). In the course of the second session, the Joint

Committee voted that proceedings to punish him for contempt be instituted against him (R. 95-97, 191-193). Thereafter, on June 19, 1957, he was again called before the Joint Committee and nineteen questions were put to him, all of which he refused to answer (R. 94-107).

The Joint Committee voted to grant immunity to the petitioner, but (on advice of his counsel) the petitioner persisted in his refusal. The petitioner was thereafter indicted for nineteen violations of Section 1330 of the New York Penal Law (refusal to testify before a legislative committee) and, after a trial without a jury, was found guilty on all counts. He was sentenced to imprisonment for one year on each of the counts, but nine of the sentences were ordered to be served consecutively, so that the term for which petitioner was sentenced was ten years (R. 259-273), a sentence modified by the Appellate Division to run concurrently, and as so modified was affirmed (R. 292-298). The Court of Appeals, the State's highest court, affirmed the conviction by a bare majority vote of four to three (R. 300).

Summary of Argument

The conduct of the officials of the State of New York would have constituted a violation of the Fourth Amendment had they been officials of the Federal government and accordingly constitutes a violation of the Fourteenth Amendment. Information secured by such means may not constitutionally be employed by the State of New York for any purpose, including the coerced elicitation of further information.

Even if the action of the State officials cannot be said to constitute a violation of the Fourth Amendment, it is nev-

ertheless conduct that shocks the conscience and offends the community's sense of fair play. As such it violates the due process mandate of the Fourteenth Amendment. Its fruits are tainted and may not be used to coerce further information from the victim of the immoral conduct.

Whether the State's action constitutes an unlawful search and seizure or a violation of the Fourteenth Amendment's inherent mandate of fair play, it is immaterial that the forum which sought to elicit further information from the petitioner was a legislative committee rather than a judicial tribunal. The command of the Bill of Rights extends equally to all agencies of government, legislative no less than judicial.

Nor, under the circumstances of this case, is it material that the first and last questions put to the petitioner by the Joint Committee did not expressly refer to the intercepted conversation or purport to be based thereon. Were it not for that interception the petitioner would never have been called before the Joint Committee or, if called, could not have constitutionally been compelled to answer incriminating questions even if tendered immunity from prosecution.

Argument

I. The use of the electronic device in the jail constituted an unreasonable search and seizure and the information thereby procured could not constitutionally be used by the State of New York to coerce further information.

1. Violation of the Fourth Amendment

The last word spoken by this Court on the compatibility of the use by government of concealed electronic eavesdrop-

ping devices and the right of privacy guaranteed by the Fourth Amendment is to be found in the case of *Silverman v. United States*, 365 U. S. 505, decided during the last term of this Court.

In previous cases, the Court ruled that use of these devices did not violate the Federal Communications Act, whose bar is limited to telephone wiretapping. In *Goldman v. United States*, 316 U. S. 129 (1942) the Court refused to upset a conviction based upon evidence obtained by means of a detectaphone placed on the wall of an office adjoining the defendant's. In *On Lee v. United States*, 343 U. S. 747 (1952) the same result was reached where a microphone was concealed in the clothing of an informer who entered the defendant's store and engaged him in conversation.

In the *Silverman* case the defendants' conviction for gambling in the District of Columbia was based on evidence obtained through the use of a "spike mike," an electronic device connected to a heating duct in the defendants' house, which in effect turned the duct into a giant microphone running through the entire house. The device was inserted into a party wall separating the defendants' house from a vacant house next to it, access to which the Federal agents gained with the consent of the owner.

In arguing against the conviction, the defendants urged the Court to overrule the *Goldman* and *On Lee* cases and hold that any use of a concealed electronic eavesdropping device violated the Fourth Amendment's guaranty against unreasonable searches and seizures. While the Court was unanimous in reversing the conviction, the majority did not find it necessary to go that far. It felt that *Goldman* and

On Lee were distinguishable, although, as the Court pointed out, a "distinction between the detectaphone employed in *Goldman* and the spike utilized here seemed to the Court of Appeals too fine a one to draw" (365 U. S. 505, at 512).

We suggest that the present case affords the Court the opportunity to do what it refused to do in *Silverman*—expressly overrule *Goldman* and *On Lee*. We believe that the time to do so has arrived.

However, as in *Silverman*, it is not necessary to do this in order to reverse the conviction here in issue. The basic principle asserted in *Silverman* is so applicable in the present case that adherence to *Silverman* requires reversal here.

It is important to note that while two of the Justices in *Silverman* concurred in the decision on the ground that the unauthorized physical penetration into petitioner's premises constituted technical trespass, the majority of the Court specifically refused to base the decision on that ground. The majority found it unnecessary "to consider whether or not there was a technical trespass under the local property law relating to party walls." "Inherent Fourth Amendment rights," the Court said, "are not inevitably measurable in terms of ancient niceties of tort or real property law" (365 U. S. 505, at 511).

The basic rationale of *Silverman* lies in governmental intrusion without legal warrant into a place where the citizen has a right to be and has a right to privacy. Whether an action in trespass would survive a demurrer under archaic standards of common law pleading is not the decisive factor. What is decisive is that there is an intrusion into a privacy upon which, according to contemporary standards of morality and decency, the government has no

right to intrude. The term "unreasonable" in the Fourth Amendment has a sweep broader than that measured by technical legalisms.

Silverman, we submit, is indistinguishable from the present case. When the prison authorities in Westchester made available to Joseph Lanza and his visitors space in the jail, that space became Lanza's home. It was a place where he was entitled to privacy and a place where government had no lawful right to intrude.

Actually, the wrong committed by the government in the present case was more egregious than that committed in *Silverman*, and the search and seizure more unreasonable here than there. In *Silverman* there was no more than a surreptitious intrusion upon privacy. There was there no misrepresentation, no deception, no breach of a relationship of trust. The government in *Silverman* did not provide the defendants there with a place to meet and confer; it did not impliedly—but realistically—assure them of privacy. They were free to meet and confer wherever they wished.

In the present case Joseph Lanza was the ward of the State of New York. He could not choose for himself a place to confer with the petitioner and others in privacy and confidence. The State supplied him with such a place and implicitly but actually represented to him and to those that conferred with him that they could do so in privacy and confidence. In *Silverman* there was but trespass (in the broad sense of the word); here there was trespass and breach of trust. If the conduct in *Silverman* was a violation of the Fourth Amendment, the conduct here was much more so.

2. The Fourth Amendment and the States

Whatever doubts may have previously existed, *Mapp v. Ohio*, 367 U. S. 643 (1961) now makes it certain that the Fourth Amendment's right of privacy is enforceable against the States through the due process clause of the Fourteenth. Conduct forbidden to the Federal government by the Fourth Amendment is forbidden to the States by the Fourteenth.

It follows from this that since the conduct committed by the State authorities in the present case would have constituted a violation of the Fourth Amendment had it been committed by Federal authorities, it necessarily constitutes a violation of the Fourteenth having been committed by State authorities.

It follows too from the *Mapp* case that the information so procured by the State of New York could not constitutionally be used by it to coerce further information. The New York Court of Appeals' per curiam affirmance did not discuss the substantive issues of the case, limiting itself to the question of the correctness of the sentence. The Appellate Division, however, indicated clearly that the basis of its decision was that "Material evidence obtained by illegal means is nevertheless admissible" (R. 295), and it may be assumed that this too was the basis of the affirmance by the majority of the Court of Appeals.

As we will seek to indicate later, even before the *Mapp* case this did not constitute a correct statement of the applicable Federal constitutional law as expressed by this Court. The standards of due process imposed upon the States by the Fourteenth Amendment would preclude use of the immorally acquired information even if the mandate of the Fourth Amendment were not applicable to the States.

However, *Mapp v. Ohio* makes it clear not only that conduct forbidden to the Federal government by the Fourth Amendment is likewise forbidden to the States by the Fourteenth, but also that information obtained by a State in violation of the Amendment may not be used against the consent of the person wronged by the violation. What the Court said in *Mapp* (367 U. S. 463), is particularly pertinent here:

"The ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people rest. Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by State officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise. Because it is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment. Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice."

It need hardly be stressed that it is constitutionally immaterial that the information illegally acquired herein was sought to be used initially by a legislative committee rather than a judicial tribunal. In the first place, the legislature was unable to elicit the sought information by itself and

found it necessary to invoke the coercive powers of the judiciary. In such case, assistance by the judiciary in this endeavor would make it a partner to the violation of the Fourth Amendment. As Mr. Justice Brandeis said in his dissenting opinion in *Olmstead v. United States* (277 U.S. 438, 483): "When the Government, having full knowledge, sought through the Department of Justice, to avail itself of the fruits of these acts in order to accomplish its own ends, it assumed moral responsibility for the officers' crimes (citing cases). And if this Court should permit the Government by means of its officers' crimes to effect its purpose of punishing the defendants, there would seem to be present all the elements of a ratification."

In the second place, the mandate of the Fourth and Fourteenth Amendments extends to all agencies of government. Indeed, as the opening words of the Bill of Rights ("Congress shall make no law") indicate, it was the legislature that was first in the minds of the authors. The basic guaranties of the Fifth Amendment, particularly the ban on coerced confessions, is applicable to legislative committees no less than to judicial tribunals, even though the Fifth Amendment, unlike the Fourth, has the apparently limiting words "in any criminal case." *Blau v. United States*, 340 U.S. 159 (1950); *Emspack v. United States*, 349 U.S. 190 (1955); *Quinn v. United States*, 349 U.S. 155 (1955). There is at least as much reason to subject legislatures to the limitations of the Fourth Amendment as of the Fifth. The right of privacy, that most important of rights of civilized men, is as vulnerable to invasion by legislative investigating committees as by prosecuting officials, and requires constitutional protection in the one case no less than in the other.

In any event, our concern here is with the Fourth Amendment as rendered applicable to the States by the Fourteenth. That amendment, it need hardly be noted at this late date, extends to every organ of State government, legislative no less than judicial or executive.

II. The conduct engaged in by the State of New York did not measure up to the standards of due process and the information thus procured could not constitutionally be used by the State to coerce further information.

I. The Immorality of the State's Conduct

The action of the State officials in causing the conversations between Joseph Lanza and his wife, brother and attorney to be electronically intercepted and recorded in the Westchester County jail was immoral and reprehensible. There is hardly a forum which has reacted to it that has not been shocked by it and has not condemned it.

The Appellate Division, in its opinion of affirmance assumed that the action was "reprehensible and offensive" (R. 295). Earlier it had called the action "gross and inexcusable" (*Lanza v. New York State Joint Legislative Committee*, 3 A. D. 2d 531), and "flagrant and unprecedented" (*Matter of Reuter (Consentino)*, 4 A. D. 2d 252, 255, 164 N.Y.S. 2d 534). The Court of Appeals had characterized it as a "gross wrong" (*Lanza v. New York State Joint Legislative Committee*, 3 N.Y. 2d 92, 101). Counsel for the Joint Committee commendably made no effort to justify or even excuse the action, but on the contrary has himself called it "repulsive and repugnant" (*Ibid*). The governor of the State called it "unwholesome and dangerous" (McKinney's 1958 Session Laws of New York, p. 1875). The Chairman of the New York Joint Legislative

Committee on Privacy of Communications called the incident "deplorable" and reported that it had "brought forth a storm of protest from lawyers, some of whom had not previously been audibly concerned about . . . efforts to protect the people's right of privacy" (Report of the New York Joint Legislative Committee on Privacy of Communications, Legislative Document (1958) No. 9, p. 25).

It was reported that after the incident at the Westchester County jail became public, a New York judge found it necessary to release a prisoner held without bail so that he would have an opportunity to consult with his attorney, since the judge could not be sure that there was any jail in the State where the prisoner could feel secure against electronic eavesdropping (New York Times, June 26, 1957, p. 64, col. 1, cited in Comment: "Abolition of Eavesdropping Exception to the Attorney-Client Privilege," 27 Fordham Law Review 390 (1958)). It was also reported that after the incident became known, the State Commissioner of Correction warned all sheriffs and jail wardens that eavesdropping on persons is illegal ("The Past is Prologue," 38th Annual Report of the American Civil Liberties Union (1957-1958), p. 84).

The most striking indication of the extent and degree to which the conscience of the community was shocked by the incident at the Westchester County jail was the New York State Legislature's amendment of Article 73 of the Penal Law, entitled "Eavesdropping," by Chapter 881 of the Laws of 1957.¹ This statute made it a criminal offense to

¹ Penal Law Section 638 provides in part:

A person: . . .

2. not present during a conversation or discussion who wilfully and by means of instrument overhears or records such conversation or discussion, or who aids, authorizes, employs, procures or permits another to do so, without the consent of a party to such conversation or discussion; . . . is guilty of eavesdropping.

do what the Westchester County jail officials did. A number of important points, all relevant to this case, must be noted in respect to the statute and its enactment.

First, the statute was enacted with remarkable speed after the Westchester County jail incident became known. The incident became public towards the end of February, 1957. On March 21st (before the petitioner herein was questioned by the Joint Committee), a conference was held between leaders of the Legislature and Counsel to the Governor and the text of the proposed law was agreed upon (Report of New York State Joint Legislative Committee to Study Illegal Interception of Communications, Legislative Document (1957 No. 29, p. 28). The bill was then quickly adopted by the Legislature and approved by the Governor, as Chapter 881 of the Laws of 1957 (Ibid, p. 34). The speed with which the statute was adopted after the incident became known—a speed which can be explained only in terms of spontaneity—attests to the deep revulsion experienced by the people of New York by reason of the incident. If, as it is generally assumed, law reflects the moral standards of the community, there can be little doubt that the people of the State of New York deemed the conduct of the jail officials to be grossly immoral.

Second, it was not, as the Appellate Division seems to imply (R. 295-296) and the State of New York argues here, the infringement on the attorney-client relationship, or even the husband-wife relationship that shocked the public conscience. The statute made electronic eavesdropping a crime without regard to the relationship between the persons whose private conversation was electronically intercepted.

Third, the Legislature, reflecting the indignation of the public, left no doubt as to who was intended to be encompassed by the prohibition. In language for which we have been unable to find any precedent, Section 741 expressly defines the word "person" to include "any law enforcement officer." A more emphatic repudiation of the conduct of the jail officials can hardly be conceived.

Fourth, and perhaps most important, the intensity of public revulsion is attested by the fact that electronic eavesdropping was made not merely a crime, but a felony.

It is not merely interesting, but significant and instructive to compare that fact with the fact that the crime with which the petitioner herein was charged is only a misdemeanor. It is not unreasonable to suggest that public policy and morality would be better served if a misdemeanor were to remain unpunished than if conduct deemed felonious should be committed by State officials.

This conduct was an act of gross or aggravated immorality, that is, it was doubly wrong. In the first place, it was an act of electronic eavesdropping, an invasion of privacy which has long been deemed offensive by American public opinion. In the second place, it constituted an act of wilful deception and entrapment, a betrayal of a fiduciary relationship and a breach of trust.

Electronic eavesdropping is the latest development in the reprehensible art of wiretapping. This has been well stated by the New York State Joint Legislative Committee to Study Illegal Interception of Communications (Legislative Document (1957) No. 29, p. 15):

"It was soon after the introduction of the telephone that our legislators in 1892 recognized the

danger of eavesdropping and made it a felony to tap a telephone wire. Their alertness has been justified by later events. In more recent times we have not been as foresighted as they.

"Lately the art of electronics has made great advance. Microphones, sound recorders, and transmitters have become compact and supersensitive. Technically it is easy to secrete a microphone in a room and overhear what goes on there. Such surveillance has become a commonplace of fact and fiction, particularly with respect to the police states of Europe. It causes revulsion in all of us."

Article 73 of the Penal Law places electronic eavesdropping and wiretapping in the same category of offense. Wire tapping, as indicated above, has been a felony in New York almost as long as the telephone has been in use. Forty years ago, Mr. Justice Holmes called wiretapping a "dirty business" (*Olmstead v. United States*, 277 U.S. 438, 470 (1928)), and that phrase has become so popular in characterizing wiretapping as to indicate universal agreement with it in the American democratic community. Mr. Justice Brandeis, referring to abuses which in a large measure motivated our War for Independence, expressed the opinion that "writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wiretapping" (*Ibid*, p. 476). A Committee of the United States Senate characterized wiretapping as an "unethical device" that "may lead to a variety of oppressions that may never reach the ears of the courts" (Sen. Rep. No. 1304, 76th Cong. 3d Sess. (1940)). Mr. Justice Douglas expressed approval of Mr. Justice Brandeis' characterization of wiretapping as "the most oppressive intrusion into the right of privacy that man had yet in-

vented." Wiretapping, he said, "wherever used, has a black record. Its invasion of privacy is ominous. It is dragnet in character, recording everything that is said, by the innocent as well as by the guilty. It ransacks their private lives, overhears their confessions and probes their innermost secrets" (Douglas, *Almanac of Liberty*, 353, 355).

These are but a representative few of the hundreds of instances that might be cited of similar condemnations of wiretapping and electronic eavesdropping as practices obnoxious to American concepts of fairness and decency. Professor Robert E. Cushman of Cornell summed it up by stating that in the United States there is "a widely held conviction that wiretapping is a dishonorable enterprise, a device of totalitarian governments with which our government should not contaminate itself" (Cushman, *Civil Liberties in the United States*, 140. See also, Rosenzweig, *The Law of Wire Tapping* 32 *Cornell L. Q.* 514, 33 *Cornell L. Q.* 73 (1947); Westin, *The Wire-Tapping Problem*, 52 *Col. L. R.* 215 (1952); *Wiretapping, Eavesdropping, and the Bill of Rights*, Hearing Before the Subcommittee on Constitutional Rights of the Committee of the Judiciary of the United States Senate pursuant to S. Res. 234, 88th Congress, Second Session (1958)).

The fact of electronic eavesdropping is but one aspect of the immorality committed at the Westchester County jail; the other lies in the betrayal of the trust which the jail officials impliedly sought and received from Joseph Lanza and his family. The Chairman of the New York Joint Legislative Committee on Privacy of Communications was both accurate and vivid when he stated that "at the request of Parole Board officers, a 'bugging' trap was set for Lanza

and his family." (N. Y. Legislative Document (1958) No. 9, p. 24.) The jail officials could have refused to allow Joseph Lanza to communicate with his family. Or they could have insisted that a jail official be present during the conversation, or even perhaps that a court stenographer be present to record stenographically what was said by Lanza and his family. They did none of these things. Instead they supplied Lanza with a room and impliedly but very really represented to him that he could converse with his family there with the freedom of privacy.

This was a misrepresentation, an act of fraud. Even worse, it was a betrayal of a fiduciary relationship. Joseph Lanza was in the control and custody of the jail officials. He could not leave to converse with his family in the privacy of his home. He was in a literal sense the ward of the warden of the jail; he had only such liberty of communication as was accorded to him by the warden. In such a situation, and particularly in view of the fact that the warden was a public official, a duty was owing higher than the "morals of the marketplace" (cf. *Meinhard v. Salmon*, 249 N. Y. 568).

It is true that the relationship of trust was to Joseph Lanza and that it is his brother, Harry, who is the petitioner in this case. But the representation was made not only to Joseph Lanza but to Harry as well. And, more important, unless the ambit of protection encompasses those who conversed with Joseph Lanza it would be an illusory protection for him. It would be of little benefit to him that he could not lawfully be coerced into testifying in respect to the conversation, if the other party to the conversation could be (*Matter of Reuter (Consentino)*, 4 A. D. 2d 252, 164 N. Y. S. 2d 534; cf. *Barrows v. Jackson*, 346 U. S. 249,

255-259; *National Association for the Advancement of Colored People v. Alabama*, 357 U. S. 449, 459).

II. The Relevance of Morality

The State's prosecuting attorney, who like counsel to the Joint Committee, is to be commended for making no effort to justify or excuse the electronic eavesdropping at the jail, nevertheless took the position apparently accepted by the courts below, that the immorality of acquisition was irrelevant to the petitioner's duty to answer. He said: "This trial is not held for any moral evaluation. . . . That is not the issue here, whether it is morally offensive or repugnant between us. The question is, is the evidence legally admissible" (R. 209). "We are not," he said, "concerned with the morality of the practice alluded to" (R. 258).

The Appellate Division adopted this contention and held that "Material evidence obtained by illegal means is nevertheless admissible" (R. 295). We submit that the moral issue cannot be so easily disposed of. Morality is not divorced from law. Ever since the patriarch Abraham peaded with God, "Shall not the Judge of all the earth do what is right?" (Genesis 18:25), man has recognized a duty on the part of sovereignty to act morally towards its subjects. Where the sovereignty is a democracy, which is the servant of and responsible to its citizens, the duty becomes a binding obligation, whether imposed by constitution, statute or common law. The "clean hands" doctrine, developed by the branch of the Anglo-American legal system which has traditionally reflected the conscience of the sovereign, rests on the principle that the law will not allow it-

self to be used as a means to further immoral ends. This Court has held that the "equal protection of the laws" clause of the Fourteenth Amendment forbade a state to allow its legal machinery to be used to further the immorality of racial discrimination through the enforcement of racial restrictive covenants (*Shelley v. Kraemer*, 334 U. S. 1). Although the Constitution contains no "equal protection" clause addressed to the Federal government, the Court nevertheless refused to permit the Federal courts to enforce such a covenant because the obligation of morality on the part of government extends beyond specific constitutional or statutory language (*Hurd v. Hodge*, 334 U. S. 24).

In *Lanza v. New York State Joint Legislative Committee* (3 N. Y. 2d 92), all seven Judges of the Court of Appeals expressed revulsion at the conduct of the State officials responsible for the interception. Three of the seven felt so strongly about it that they would have applied the truly extraordinary and unprecedented remedy of enjoining the Joint Committee from making public the contents of the recording. The other four, a bare majority, felt that under the principle of division of powers among the several branches of our government, the judiciary could not by injunction interfere with the functions of the legislature acting within its jurisdiction.

But the principle of division of powers has reciprocal obligations of restraint. If the judiciary cannot enjoin the legislature from publicizing or utilizing the recording notwithstanding the immorality of its acquisition, neither can the legislature compel the judiciary to be party to the immorality by coercing replies based on the recording. If this were not so, we would have the English system of legis-

lative omnipotence rather than the American system of an independent judiciary with a right and indeed a duty to review the acts of the legislature to determine not merely if they conform to constitutional requirements but also to the basic principles of morality that underlie all constitutions.

III. Morality and Due Process of Law

We submit that the due process clause imposes a mandate of morality upon government, and that the immorality of the acquisition of the information here in issue precludes its use by government.

In *Wolf v. Colorado* (338 U. S. 25), this Court defined "due process of law" as "the compendious expression for all those rights which the courts must enforce because they are basic to our free society." Foremost of these rights, said Mr. Justice Brandeis, is the right of privacy, "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men" (*Olmstead v. United States*, 277 U. S. 438, 478).

"The security of one's privacy against arbitrary intrusion by the police," the Court said in *Wolf v. Colorado*, *supra*, "is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause . . . Accordingly, we have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment."

In *Rochin v. California* (342 U. S. 165), the Court unanimously upset a State conviction based upon use as evi-

dence of morphine tablets forcibly removed from the defendant's stomach by means of a pump. Much of the language used by the Court in that case is particularly appropriate here:

"However, this Court too has its responsibility. Regard for the requirements of the Due Process Clause 'inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings (resulting in a conviction) in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking people even toward those charged with the most heinous offense.' These standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental, or are implicit in the concept of ordered liberty.'

* * * * *

"Applying these general considerations to the circumstances of the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. *This is conduct that shocks the conscience.* . . .

"It has long since ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained . . . (Due process imposes) *the general requirement that the States in their prosecutions respect certain deficiencies of civilized conduct*" (p. 169-173). (Emphasis added.)

Due process of law, the Court said further in the *Rochin* case, bars use by the State of information acquired by methods that "offend the community's sense of fair play." The due process clause came into our constitutions as the culmination of a long struggle to impose upon government those obligations of decency and fair play that the community has the right to expect from the agency of society which fixes by the force of law the moral standards of the community. (See, Pfeffer, *The Liberties of an American*, 153-159.)

We do not believe that the *Rochin* case can be distinguished on the ground that in that case force was used whereas here we have only guile. In the first place, there is little to choose between force and fraud in the hierarchy of immorality; they are equal in the extent to which they shock the conscience of the democratic community and offend our Anglo-American sense of justice and civilized conduct. In the second place, it is not entirely correct to say that force is absent from the present case; it is more accurate to say that force has been added to fraud. What was begun by deceit was sought to be carried forward by force. To the concealed microphone there had been added the revealed threat of nineteen years imprisonment. In the *Rochin* case the act of force took place in a hospital ward; in the present case it took place in the hearing room of the Association of the Bar in the City of New York. What is involved in the present case is not (as in the *Rochin* case) merely the admissibility or inadmissibility of immorally acquired evidence; what is involved is the power of the State to aggravate and extend the immorality by forcing testimony based on the evidence. We submit that such conduct is no less offensive to concepts of justice and fair play than was the conduct in the *Rochin* case.

However, the conclusive answer to any contention that in the absence of brute force there can be no violation of the "due process" clause is to be found in the case of *Leyra v. Denno* (347 U. S. 556), a case which, we suggest, presents exactly the same issues of constitution and conscience that are found in the present case. In that case a confession was obtained in a police station through apparently sympathetic and solicitous interrogation by a psychiatrist who was introduced to the suspect by the police as a physician who was going to give him medical relief from his mental sufferings. Police officials were secreted in an adjoining room and were able by means of an electronic microphone and recording machine (as in the present case) to listen to and record the conversation between the two. At the conclusion of the conversation, the officials immediately came into the room and, on the basis of the admissions of guilt made orally to the psychiatrist, they were able to induce the accused to sign a full confession. The Court found the fundamental facts in the case to be indistinguishable from those in the *Rochin* case, and held violative of the "due process" clause not only use of the recorded transcript of the oral conversation, but also the written confession that emanated from it.

Leyra v. Denno, we submit, is indistinguishable from the present case. In both guile and deceit rather than force was utilized. In both a relationship of trust existed. In both the immorality at the source tainted the secondary product (the signed confession in *Leyra*, the questions put to the petitioner in the present case). *Leyra v. Denno*, we submit, requires reversal of the judgment herein.

The prosecuting attorney laid great stress in the trial on the fact that the action of the Westchester County jail

officials was not illegal or criminal when it took place (R. 259). The Appellate Division, too, appears to have considered that fact to be significant (R. 295). We submit that this was error.

Insofar as the due process clause of the Fourteenth Amendment is concerned, the fact that no state statute has been violated is, if not irrelevant, certainly not determinative. Indeed, the entire purpose of the Amendment was to forbid conduct that state law permitted. The Amendment would be meaningless if its mandate could be avoided by the simple process of enacting a State statute legalizing what would otherwise be a deprivation without due process.

That, at least, is how this Court has consistently interpreted the Fourteenth Amendment. In *Powell v. Alabama* (287 U.S. 45), the Court held that the "due process" clause was violated by the failure of a State to accord a defendant's counsel in a criminal case adequate time to prepare for trial, even though the conduct of the trial court was completely consistent with State law. In *Chambers v. Florida* (309 U.S. 227), the Court set aside, as violative of due process, a conviction based upon a confession obtained from a prisoner who had been held incommunicado even though no state law was violated thereby. Most important, in *Leyra v. Denno*, which is so close on its facts to the present case, there was no violation of the State's criminal law in the action either of the psychiatrist or the police officials.

Both the Appellate Division (R. 295-296) and the trial judge (R. 260) held that the illegality or immorality of the method by which evidence is obtained does not render

it inadmissible in a criminal proceeding. Presumably, the Court of Appeals accepted this holding. We admit that application of this principle to the case at bar was erroneous for two reasons.

In the first place, it is not always true that the admissibility of evidence is not dependent upon the method of its acquisition. *Rochin v. California*, *Leyra v. Denno*, *Powell v. Alabama*, *Chambers v. Florida*, and a host of other cases (see, Pfeffer, *The Liberties of an American*, chapter 6), establish fairly conclusively that evidence acquired by means that shock the conscience or are beyond the limits set by ~~our~~ concept of ordered liberty are not admissible in a criminal proceeding. In the present case, we believe that the conduct of the Westchester County jail officials was no less reprehensible and no less beyond the concept of ordered liberty than the conduct condemned in the *Rochin*, *Leyra*, *Powell*, *Chambers* and other cases.

In the second place, the issue here is not the admissibility of evidence. The New York decisions (*People v. Adams*, 176 N.Y. 351; *People v. Defore*, 242 N.Y. 13; *People v. Richter's Jewels*, 291 N.Y. 151; *People v. Variano*, 5 N.Y. 2d 391, 394; *People v. Oinan*, 7 A.D. 2d 119, aff'd 6 N.Y. 2d 715) relied upon by the Appellate Division (R. 295-296) rest upon a situation in which the illegality or immorality has been completely consummated when the issue of admissibility arises. The evil has been done and the only question is whether a jury may or may not take cognizance of information that resulted therefrom. In balancing "the social need that crime shall be repressed" against "the social need that law shall not be flouted by the insolence of office" (*People v. Defore*, 242 N.Y. 13, 24-

25), the New York courts have, unlike the Federal courts, decided in favor of the former need. But they have decided so only to the extent of allowing the evidence to be placed before the jury by the prosecutor. They have never gone so far as to compel the victim of the wrong actively to participate in its extension. They have never held that the immorally acquired evidence could legally be used to coerce further information from him.

The New York courts have long recognized that the use of tainted evidence to procure a conviction is evil. They have felt constrained to permit its use as a necessary evil in order to detect and punish criminals and thereby deter further commission of crime. We submit, however, that the evil should be confined to its necessity. It should not be extended by expansion through further questioning. Above all, it should not be extended by coercing participation in its expansion by the victim of the evil.

As Mr. Justice Frankfurter said in *On Lee v. United State* (343 U.S. 747, 758-759):

"The law of this Court ought not be open to the just charge of having been dictated by the 'odious doctrine', as Mr. Justice Brandeis called it, that the end justifies reprehensible means. To approve legally what we disapprove morally on the ground of practical convenience is to yield to a short-sighted view of practicality. . . . The contrast between morality professed by society and immorality practiced on its behalf makes for contempt of law. Respect for law cannot be turned off and on as though it were a faucet."

In any event, *Mapp v. Ohio*, *supra*, makes it quite clear that the New York decisions cited by the Appellate Divi-

sion are no longer determinative and that a State may not, consistent with the Fourteenth Amendment, use immorally acquired evidence against the victim of the immorality.

III. Absence of express reference to the intercepted conversation in the first and last questions put to the petitioner does not remove the taint of immorality or avoid the ban of the Fourteenth Amendment.

In its brief in opposition to the petition for certiorari herein the State of New York laid major emphasis (it was Point I of the brief) on the claim that since the first and nineteenth questions put to the petitioner were general and did not specifically refer to the intercepted conversation, the conviction herein can be sustained irrespective of the infirmity of the other counts of the indictment.² This, we submit, is erroneous.

It is important to note that every question asked the petitioner was inextricably connected with and grew out of the information gained through the eavesdropping. Had there been no eavesdropping, the petitioner would never have been called to testify before the Joint Committee. Indeed, had there been no eavesdropping it is highly doubtful that the petitioner could constitutionally have been coerced to testify before the Committee. In upholding contempt convictions against witnesses subpoenaed to appear before

² The first question was: "Q. On February 5, 1957, your brother Joseph Lanza was arrested and returned to prison charged with a violation of parole. Tell the committee, please, any and all efforts extended by you to assist in obtaining the release of your brother Joseph Lanza on parole or his restoration to parole." (R. 6)

* The last question was: "Q. Mr. Lanza, please tell the name of anybody with whom you spoke during the month of February 1957 about the restoration to parole of your brother Joseph Lanza?" (R. 30)

legislative investigating committees, this Court has stressed that the witnesses were not called before the committees as part of a dragnet procedure but that in each case there were reasonable grounds for believing that the particular witness called had information relevant to the inquiry being conducted by the committee.³ But for the intercepted conversation, the Joint Committee would have had no grounds for believing that the petitioner had such information. Petitioner was a reputable business man with no prior criminal record (R. 297). Other than the intercepted conversation, the only thing that connected him with the subject of the Joint Committee's investigation was the fact that he was Joseph Lanza's brother and visited him once in jail—a natural fraternal act hardly sufficient to constitute reasonable ground for belief that he had information relevant to the inquiry.

We submit that subsidiary or derivative questions asked of the petitioner stand on no different ground from those that repeat the intercepted conversation *in haec verba*. As

³ Cf. *Wilkinson v. United States*, 365 U.S. 399, 412 ("It is to be emphasized that the petitioner was not summoned to appear as the result of an indiscriminate dragnet procedure, lacking in probable cause for belief that he possessed information which might be helpful to the subcommittee. As was made clear by the testimony of the Committees's Staff Director at the trial, the subcommittee had reason to believe at the time it summoned the petitioner, that he was an active Communist leader engaged primarily in propaganda activities. This is borne out by the record of the subcommittee hearings, including the content of the Staff Director's statement to the petitioner and evidence that at a prior hearing the petitioner had been identified as a Communist Party member."); *Braden v. United States*, 365 U.S. 431, 435 ("The subcommittee had reason to believe that the petitioner was a member of the Communist Party and that he had been actively engaged in propaganda efforts."); *Uphaus v. Wyman*, 360 U.S. 72, 79 ("... the Attorney General had valid reason to believe that the speakers and guests at World Fellowship might be subversive persons within the meaning of the New Hampshire Act.").

this Court stated in *Nardone v. United States* (308 U. S. 338, 341), "the knowledge gained by the Government's own wrong cannot be used by it simply because it is used derivatively." Or, as stated in *Silverthorne Lumber Co. v. United States* (251 U. S. 385, 392), "The essence of a provision forbidding the acquisition of evidence in a certain way is not merely that the evidence so acquired shall not be used before the court, but that it shall not be used at all." In *Leyra v. Denno, supra*, the Court held violative of the due process clause not only use of the recorded transcript of the oral conversation, but also the written confession that emanated from it.

We submit that the State of New York could not constitutionally purge itself of its immorality or immunize itself from the operation of the Fourteenth Amendment by the expedient of sandwiching the seventeen patently tainted questions between an apparently innocuous first and last question. Constitutional obligations would be meaningless if they could so easily be evaded.

CONCLUSION

For the reasons set forth herein the conviction of petitioner should be reversed and the indictment against him dismissed.

Respectfully submitted,

LEO PFEFFER

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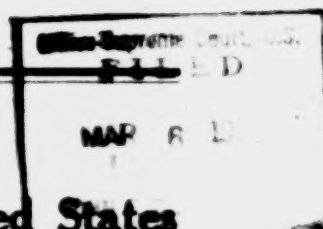
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IN THE

Supreme Court of the United States

October Term, 1961

No. 236

HARRY LANZA,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Writ of Certiorari to the New York Court of Appeals

BRIEF FOR THE PEOPLE OF THE STATE OF NEW YORK

FRANK S. HOGAN
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New York County

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IN THE
Supreme Court of the United States
October Term, 1961

No. 236

HARRY LANZA,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Writ of Certiorari to the New York Court of Appeals

**BRIEF FOR THE PEOPLE OF THE STATE OF
NEW YORK**

Pertinent Statutes

Section 1330 of the Penal Law, upon which the indictment is based, reads as follows:

“§1330. Refusing to testify

“A person who being present before either house of the legislature or any committee thereof authorized

to summon witnesses, wilfully refuses to be sworn or affirmed, or to answer any material and proper question, or to produce upon reasonable notice any material and proper books, papers, or documents in his possession or under his control, is guilty of a misdemeanor."

The immunity provisions in the Penal Law, pursuant to which the defendant was summoned to appear as a witness, was offered immunity and was ordered to testify, are the following:

**"§381. Offender a competent witness;
witnesses' immunity.**

"1. A person who has violated any section of this chapter relating to bribery or any section of this article [Art. 34] or who has committed an attempt to violate any such section is a competent witness against another person so offending.

"2. In any criminal proceeding before any court, magistrate or grand jury, or upon any investigation before any joint legislative committee, for or relating to a violation of any section of this chapter relating to bribery or any section of this article or an attempt to commit any such violation, the court, magistrate or grand jury, or the committee may confer immunity in accordance with the provisions of section two thousand four hundred forty-seven of this chapter."

"§584. Witnesses' immunity

"In any criminal proceeding before any court, magistrate, or grand jury, or upon any investigation before any joint legislative committee for or relating to a violation of any of the provisions of this article [dealing with conspiracy], the court, magistrate or grand jury, or the committee, may confer immunity in accordance

with the provisions of section two thousand four hundred forty-seven of this chapter.³

“§2447. Witnesses’ immunity.

“1. In any investigation or proceeding where, by express provision of statute, a competent authority is authorized to confer immunity, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and, notwithstanding such refusal, an order is made by such competent authority that such person answer the question or produce the evidence, such person shall comply with the order. If such person complies with the order, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, then immunity shall be conferred upon him, as provided for herein.

“2. ‘Immunity’ as used in this section means that such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order by competent authority, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceeding. But he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury or contempt committed in answering, or failing to answer, or in producing or failing to produce evidence, in accordance with the order, and any such answer given or evidence produced shall be admissible against him upon any criminal proceeding concerning such perjury or contempt.

“3. ‘Competent authority’ as used in this section means:

• • •

“(d) A legislative committee or temporary state commission before which a person is called to answer questions or produce evidence in an inquiry or investigation, upon twenty-four hours prior written notice to the attorney-general of the state of New York and to the appropriate district attorney having an official interest therein; provided that a majority of the full membership of such committee or commission concur therein;

. . .

“Provided, however, that no such authority shall be deemed a competent authority within the meaning of this section unless expressly authorized by statute to confer immunity.

“4. Immunity shall not be conferred upon any person except in accordance with the provisions of this section.

“5. If, after compliance with the provisions of this section, or any other similar provision of law, a person is ordered to answer a question or produce evidence of any other kind and complies with such order, and it is thereafter determined that the appropriate district attorney having an official interest therein was not notified, such failure or neglect shall not deprive such person of any immunity otherwise properly conferred upon him.”

Questions Presented

Are there counts in the indictment which will support the judgment regardless of the constitutional issues?

Were the petitioner's constitutional rights violated by a State Legislative Committee asking him questions predicated upon information gathered by eavesdropping conducted in a state prison?

Is eavesdropping in a prison violative of due process or the search and seizure sanctions of the United States Constitution?

Statement of the Case

On June 19, 1957, the petitioner was called before the Joint Legislative Committee on Government Operations of the Legislature of the State of New York (R 50), a duly constituted state body, to be questioned concerning any knowledge that he might have pertinent to corruption in the New York State Parole Commission (R 89-90). The Committee, after granting the petitioner immunity from prosecution (R 116-20), directed that he reply to a number of questions (R 120-34). The Committee counsel formulated a majority of his questions based on information independently gathered by another state agency (R 156-72, R 173). Officials at the Westchester County Jail had supplied the Committee with transcripts of three conversations which were obtained by use of an electronic recording device which was installed in a prison visitors' room (R 156-72). A different prison room without a recording device

was used for attorney-client conferences (R 305, 313, 314, 330). The petitioner was a party to one of the overheard conversations (R 156-72, 315).

For failing to answer the questions pursuant to direction, the petitioner was indicted on nineteen separate counts of refusing to testify.¹ Each count in the indictment was based upon a single question which the petitioner refused to answer before the Committee. The trial court found the defendant guilty on each of the nineteen separate counts (R 263) and sentenced him to ten consecutive terms of one year each (R 267-74).

The New York Supreme Court, Appellate Division, First Department, modified the judgment by directing that the terms imposed be served concurrently, and left open the question of the number of crimes committed (R 292-98).

The Appellate Division held in part:²

"It may well be that the refusals to testify here involved relate broadly to only two separate subjects, the defendant's efforts towards bringing about his brother's release on parole and the conversation had on February 13, 1957 between defendant and his brother. Whether thereby the defendant's 19 refusals to testify as alleged in this indictment constitute only two separate crimes or more, we do not now decide, since the conviction on any one count is sufficient to sustain the sentence as hereby modified. (*People v. Faden*, 271 N. Y. 435, 444-445.)."

1. N. Y. Penal Law §1330.

2. R 297; 10 App. Div. 2d 315, 319 (1st Dept. 1960).

The New York Court of Appeals modified the judgment further, holding that a single crime had been committed, but that the sentence need not be altered (R 300).

The Court of Appeals noted:

"The Appellate Division having directed that the penitentiary sentences run concurrently and not consecutively and, as so modified, having affirmed the judgment of the Court of General Sessions, we direct that the judgment be further modified by finding defendant guilty of but one crime (*People v. Riela*, 7 N. Y. 2d 571). It is clear from the determination of the Appellate Division that the number of crimes of which the defendant was found guilty did not enter into the duration of the sentence imposed."

Introduction

The petitioner herein asserts a constitutional infirmity in his conviction owing to the manner of obtaining and ultimate use made of conversations between himself and his imprisoned brother. Eavesdropping by certain state officers, he claims, infringed his constitutional rights and questions based thereon, subsequently put to him by a Legislative Committee—which had no part in the eavesdropping—amounted to an "immoral" transgression of due process of law. There is no allegation that the trial at which the petitioner was convicted failed in any manner to comport with constitutional standards.

In addition to the counts allegedly infected by the use of eavesdropping techniques, the petitioner was convicted of failing to reply to certain questions derived from independent, unspecified information.

Because of this Court's announced policy of abstaining from unnecessary constitutional construction and because this case may be determined without reaching the petitioner's constitutional contentions, we first treat herein the severability of the questions which the petitioner refused to answer. We shall then proceed to discuss the alleged constitutional infringements, distinguishing between the utilization of the information at the hearing and its initial acquisition.

POINT I

The judgment is fully supported by proof that the petitioner refused to answer two questions not derived from eavesdropping [answering petitioner's Point III (brief, pp. 29-31)].

The petitioner stands convicted of a nineteen count indictment, the multiple charges of which have been deemed a single crime by the order of the New York Court of Appeals here under review. Each of the nineteen separate allegations involves a refusal by the petitioner to answer a specific question posed to him by a concededly authorized investigative committee of the state legislature. Although convicted of refusal to answer all nineteen questions, there can be no doubt that the petitioner's refusal to reply to any one of the proper questions would suffice to support his conviction of the single crime in question.

Admittedly, a number of the questions put to the petitioner by the Committee were predicated on conversations between the petitioner and his brother which were overheard by means of a concealed electronic device (R 161-8). Equally well established, however, is the fact that at least

two of the questions fruitlessly posed (incorporated in Counts 1 and 19) were derived from sources wholly unconnected with the eavesdropping. The proof of separate derivation, refuting the petitioner's claim that all questions were "inextricably connected" (brief, p. 29), was adduced at the trial during cross-examination of Mr. Bauman, the Committee's counsel, concerning the basis of the questions he had asked the petitioner (R 159-61).

"Q. Now, after examining the 19 counts contained in the indictment here, can you tell me whether the data or material on which were propounded your questions were the result of information you gave or gathered from those interceptions? A. I think some of the questions were based upon the recordings of conversations between Joseph and Harry Lanza, and other or others of them as I hastily thumbed through the indictment were not.

"Q. Can you show me one of the 19 questions which were not the result of the tapes which you had available to you? A. The first one that occurs to me and this I do not mean to infer is the only one but you asked me to show you one example, the first one I would like to refer to is the count numbered 18th [*sic*. Actually, 19th] or the last count of this indictment.

"Q. Would you read the question, Mr. Bauman, please? A. In the last count of the indictment, so there is no confusion of what I am referring to, which is numbered 18th, [*sic*. Actually, 19th] the question is specified as follows: 'Mr. Lanza, please tell the Committee the name of anyone with whom you spoke during the month of February 1957 about the restoration to parole of your brother Joseph Lanza.'

"Q. You can tell me now, Mr. Bauman, that you didn't ask that question as a result of the information that was made available to you from those tapes?

A. I can.

"Q. You can say that without fear of successful contradiction, is that correct? A. Yes, I think so.

"Q. Show me one other question, Mr. Bauman?

A. Well, I will start with number One.

"Q. Will you do that please? A. Yes (looking through indictment). In the first count, Mr. Durenzo?

"Q. Yes. A. The question is quoted as follows: 'On February 5th 1957 your brother Joseph Lanza was arrested and returned to prison charged with a violation of parole. Tell the Committee, please, any and all efforts extended by you to assist in obtaining the release of your brother Joseph Lanza on parole or his restoration to parole?'

"Q. You say that you did not gather any material from the tapes upon which to predicate that question, Mr. Bauman? A. I have said and I say, Mr. Durenzo, that that question as well as the previous one was not based upon any material in the tapes.

"Q. You are sure about that? A. Yes."

The indisputable independence of these two questions entirely frees them of any taint which might affect the remaining questions owing to the manner in which the information on which they were founded had been obtained. Thus, even assuming, without conceding, the validity of the petitioner's assertion that the Constitution forbade the utilization of material obtained by eavesdropping, the judgment, resting in part on uncontaminated matter, should be affirmed.³

3. See N. Y. Penal Law §§1330. 1937.

This conclusion is compelled by the long established principle that a judgment on multiple counts stands if any count thereunder is sufficient in itself to support it. In *Claassen v. United States*,⁴ the Court states the principle and recites its history:

"In criminal cases, the general rule, as stated by Lord Mansfield before the Declaration of Independence, is 'that if there is any one count to support the verdict, it shall stand good, notwithstanding, all the rest are bad.' *Peake v. Oldham*, Cowper, 275, 276; *Rex v. Benfield*, 2 Bur. 980, 985. See also *Grant v. Astle*, 2 Doug. 722, 730. And it is settled law in this court, and in this country generally, that in any criminal case a general verdict and judgment on an indictment or information containing several counts cannot be reversed on error, if any one of the counts is good and warrants the judgment, because, in the absence of anything in the record to show the contrary, the presumption of law is that the court awarded sentence on the good count only. *Locke v. United States*, 7 Cranch, 339, 344; *Clifton v. United States*, 4 How. 242, 250; *Snyder v. United States*, 112 U. S. 216; *Bond v. Dustin*, 112 U. S. 604, 609; 1 Bishop Crim. Pro. §1015; Wharton Crim. Pl. & Pract. §771."

The rule has been reiterated and followed in an unbroken line of decisions down through the years,⁵ and is also

4. 142 U. S. 140, 146 (1891).

5. *Evans v. United States*, 153 U. S. 584 (1894); *Debs v. United States*, 249 U. S. 211 (1919); *Abrams v. United States*, 250 U. S. 616 (1919); *Brooks v. United States*, 267 U. S. 432 (1924); *Kawa-kita v. United States*, 343 U. S. 717 (1952); and *Barenblatt v. United States*, 360 U. S. 109 (1959).

The same doctrine is also well established in New York by opinions of the Court of Appeals. *People v. Davis*, 56 N. Y. 95 (1874); *Hope v. People*, 83 N. Y. 418 (1881); *People v. Cummins*, 209 N. Y. 283 (1913); and *People v. Faden*, 271 N. Y. 435 (1936).

applicable to a state judgment on review by certiorari.⁶ Following the general rule, three circuit courts recently held that judgments will be affirmed even though some counts are upset for being based upon evidence obtained in violation of the Fourth Amendment.⁷

In a vain attempt to avoid the force of this principle, the petitioner alleges that, but for the eavesdropping, he would never have been called to testify before the Committee (brief, pp. 29-30). This argument, conjectural and speculative at best, is not specifically rebutted by the record. The record, however, does indicate that the Committee had other information (R 90-1, 203) and sought to interrogate the petitioner based on that information (R 159-61, 168, 202-3). The Committee also had available public records⁸ which indicated that the petitioner was one of the three people who visited Joseph Lanza in prison (R 315). From these facts, and without any indication of the Committee's other investigatory methods, it is reasonable to infer that the petitioner would have been called as a witness by the Committee even if the transcripts did not exist.

In any event, even if the petitioner was summoned as a result of the overheard conversations, his subsequent ex-

6. *Whitfield v. Ohio*, 297 U. S. 431 (1936).

7. *United States v. Warren*, 259 F. 2d 142 (7th Cir. 1958); *Cox v. United States*, 287 F. 2d 41 (9th Cir. 1961); *Williams v. United States*, 260 F. 2d 125 (8th Cir. 1958).

8. The Regulations of the N. Y. State Commission of Correction provide (p. 27):

"A record should be kept in each jail, giving the name and address of each visitor, date of visit, name of inmate visited, whether the visitor brought a package to the inmate and a statement as to the contents of packages intended for inmates."

amination is not necessarily polluted. It will be recalled that the recent case of *Costello v. United States*⁹ held that, where an individual is called before a grand jury as a result of illegal wiretaps, any information obtained by questioning him on independent matters is free of contamination and available in a subsequent proceeding. A key similarity exists between *Costello* and the present case. In each case, certain of the questions asked were not based on overheard information and were consequently free of the taint which infected other matters probed at the same inquiry. This Court's discussion of the subject follows:

"Moreover, District Attorney Hogan testified in the present proceeding. He expressly disavowed that his questions of the petitioner as to his activities during Prohibition were based on the 1943 wiretaps. * * *

* * *

"It is true that the 1943 wiretaps prompted the calling of the petitioner before the county grand jury and the Official Referee. But the 'fruit of the poisonous tree' doctrine excludes evidence obtained from or as a consequence of lawless official acts, not evidence obtained from an 'independent source.' *Silverthorne Lumber Co. v. United States, supra*, [251 U. S.] at 392. We said in *Nardone v. United States*, 308 U. S. 338, 341, 'Sophisticated argument may prove a causal connection between information obtained through illicit wire-tapping and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint.' We are satisfied that any knowledge in Mr. Hogan's possession which impelled the petitioner to answer truthfully came from such independent sources and that any

9. 365 U. S. 265, 279, 280 (1961).

connection between the wiretaps and the admissions was too attenuated to require the exclusion of the admissions from evidence."

In sum, it is evident from the foregoing that the petitioner was convicted on two independent allegations that he refused to answer questions derived from sources uncontaminated by eavesdropping. Since either of these refusals are sufficient to support the judgment, it should be, accordingly, affirmed.

Considering this Court's policy of avoiding unnecessary decisions limiting legislative investigation where another basis for decision exists, the conclusions reached here suggest a logical and demanding basis for the resolution of this instant case. Certainly, the judicial attitude toward legislative inquiry referred to in *United States v. Rumely*,¹⁰ which strongly counseled "abstention from adjudication unless no choice is left," is a significant guidepost for decision in the present case.

10. 345 U. S. 41 (1952).

POINT II

Due process was not offended by the proceedings of the Legislative Committee hearing [answering in part petitioner's Point I (brief, pp. 11-13)].

The petitioner's conviction stems from an investigation by a duly constituted Joint Committee of the New York Legislature which called as a witness the petitioner who might have had information pertinent to one of the Committee's lawful and valid legislative objectives. The petitioner appeared, with legal counsel, and declined to answer a series of questions. In essence, the petitioner presently claims that the asking of these questions at the hearing deprived him of due process of law and his refusal to answer was therefore justified.

The most conscientious and painstaking examination of the situation presented by the instant case fails to reveal either deprivation or threat to any substantial right of the petitioner cognizable by the due process protection of the Constitution.

First and foremost, it is clear beyond peradventure that the petitioner was absolutely and completely insulated against danger of criminal conviction on account of cooperation with the Committee. In fact, cooperation was his safest course, for by truthful response to the questions posed, he would have won inviolable immunization against any possible future use of his answers against him. It will be recalled that, following the petitioner's initial refusal to answer on grounds of possible self incrimination,¹¹

11. See N. Y. Constitution Art. I §6.

he was granted "full immunity" (R 120).¹² There is no claim that the protection thus guaranteed against future prosecution based on, or use against him of, any disclosures he might have made was inadequate in any respect. And it has been established that immunity broad enough to cover the right lost can be fairly substituted for the Constitutional privilege against self incrimination, even where the Fifth Amendment itself is directly applicable.¹³

As this Court stated in *Ullmann v. United States*:¹⁴

"[T]he immunity granted need only remove those sanctions which generate the fear justifying invocation of the privilege: 'The interdiction of the Fifth Amendment operates only where a witness is asked to incriminate himself,—in other words, to give testimony which may possibly expose him to a criminal charge. But if the criminality has already been taken away, the amendment ceases to apply.' *Hale v. Henkel*, 201 U. S. 43, 67, 26 S. Ct. 370, 376, 50 L. Ed. 652. * * * Immunity displaces the danger. Once the reason for the privilege ceases, the privilege ceases."

Indeed, the total immunization of the petitioner herein characterizes the entire case and demonstrates the specious quality of his present assertion of unconstitutional invasion. Being kept wholly out of danger, the petitioner, as

12. N. Y. Penal Law §§2447, 381, 584.

13. *Counselman v. Hitchcock*, 142 U. S. 547 (1892); *Brown v. Walker*, 161 U. S. 591 (1896); *Hale v. Henkel*, 201 U. S. 43 (1906); *Regan v. New York*, 349 U. S. 58 (1955); the failure of state-granted immunity to cover possible federal prosecution, moreover, is no material defect barring the state from conducting an investigation under the fullest measure of immunity available to them to accord. *Knapp v. Schweitzer*, 357 U. S. 371 (1958).

14. 350 U. S. 422, 431, 439 (1956).

a witness in a valid legislative proceeding, is without the pale of the legitimate concern of the Constitution.

The petitioner's secure position is further evident from additional circumstances. For example, if there might be said to be a "target" for the investigation in question, it assuredly was not the petitioner. The investigation was stimulated by public disclosures concerning his brother's release on parole. Its aim was to discover possible corruption in the State Parole Commission and recommend remedial measures. The role of the petitioner was purely that of a witness who might have information of value to the Committee.

As a witness, the petitioner enjoys no standing to inquire into or challenge the Committee's sources of information. The information flowing to a legislative committee comes from a variety of tributaries—some reliable, others doubtful. Its questions may be based upon the most tenuous information or on no information at all. Basically, questions seek facts, they do not accuse or condemn; a question is not "evidence" even in a trial. To allow a witness, who is adequately protected, to explore these tributaries can only cause delay and confusion to the legislature without any corresponding benefit to the witness. As the Court said in *Norwegian Nitrogen Products Co. v. United States*,¹⁵ a commission hearing "does not include a privilege to ransack the records of the Commission, and to subject its confidential agents to an examination or to all that they have learned." Surely a like rule applies to legislative investigations.

¹⁵ 288 U. S. 294 (1933).

Moreover, it is apparent from the nature of the Committee's work that its function was wholly investigatory. This was no quasi-judicial tribunal whose deliberations could adjudicate or affect the rights or position of the petitioner. As a witness in such a proceeding, his access to the due process provision of the Constitution is accordingly limited severely.¹⁶ This Court's discussion of the differing applications of due process in the functional dichotomy, set forth in *Hannah v. Larche*,¹⁷ is illuminating:

" 'Due process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. On the other hand, when governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used. Therefore, as a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account.

16. In analogous situations involving fact-finding agencies this Court has held that due process is not violated when a witness' attorney is excluded from the hearing room [*In re Groban*, 352 U. S. 330 (1959); *Anonymous v. Baker*, 360 U. S. 287 (1959)].

17. 363 U. S. 420, 442-443 (1959).

An analysis of these factors demonstrates why it is that the particular rights claimed by the respondents need not be conferred upon those appearing before purely investigative agencies, of which the Commission on Civil Rights is one."

Entirely apart from the petitioner's lack of standing to challenge the derivation of the Committee's questions, the courts themselves have repeatedly declined to intrude in the self-informing processes of a legislative body. Under honored concepts of federalism as well as the separation of legislative and judicial functions, supervision by this Court is limited by the vital right of a state legislature to conduct information-gathering investigations legitimately related to valid legislative purposes. As this Court has said, "Experience admonishes us to tread warily in this domain."¹⁸ Judicial restraint, therefore, wisely limits supervision of the functions of a legislative committee.¹⁹

The basis for the long respected independence of the legislative operation was clearly set forth in two leading opinions of the District of Columbia Circuit Court of Appeals. In *Hearst v. Black*,²⁰ it was said:

"The Constitution has lodged the legislative power exclusively in the Congress. If a court could say to the Congress that it could use or could not use information in its possession, the independence of the Legislature would be destroyed and the constitutional separation of the powers of government invaded. Nothing is better settled than that each of the three great depart-

18. *United States v. Rumely*, 345 U. S. 41, 46 (1952).

19. See, *McGrain v. Daugherty*, 273 U. S. 135 (1927).

20. 87 F. 2d 68, 71-72 (D. C. Cir. 1936).

ments of government, shall be independent and not subject to be controlled directly or indirectly by either of the others."

In *Barsky v. United States*,²¹ the court stated that the remedy for legislative misconduct by a committee is with the parent body or with the people:

"The remedy for unseemly conduct, if any, by Committees of Congress is for Congress, or for the people; it is political and not judicial. 'It must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.' The courts have no authority to speak or act upon the conduct by the legislative branch of its own business, so long as the bounds of power and pertinency are not exceeded, and the mere possibility that the power of inquiry may be abused 'affords no ground for denying the power.' "

Finally, it should be pointed out that, despite the broad language of *Silverthorne Lumber Co. v. United States*,²² there is no absolute ban on the use of illegally obtained evidence. This Court has held that indictments will not be quashed although based on illegally obtained or other incompetent evidence.²³ Similarly, illegally obtained evidence, as well as its fruits, may be used against one not aggrieved by the manner of its acquisition.²⁴ These cases,

21. 167 F. 2d 241, 250 (D. C. Cir. 1948).

22. 251 U. S. 385, 392 (1920).

23. *Holt v. United States*, 218 U. S. 245 (1910); *Costello v. United States*, 350 U. S. 359 (1956); *Lawn v. United States*, 355 U. S. 339 (1958).

24. *Goldstein v. United States*, 316 U. S. 114 (1942); *United States v. Costello*, 255 F. 2d 876 (2nd Cir. 1958); *Dorsey v. United States*, 174 F. 2d 899 (5th Cir. 1949) cert. denied 338 U. S. 950.

while not directly in point, demonstrate that whatever infirmity might result from the improper gathering of information, it is not an indelible taint which inheres in the evidence itself and infects any and all subsequent use of it.

In sum, the protection afforded to the petitioner by the United States Constitution is not unqualified. The constitutional concern is to insure that the citizens of the States are not deprived of substantial rights by the action of government except by due process of law. The nature of the Joint Legislative Committee hearing, the status of the petitioner before that body, and the immunity awarded him were such that the petitioner had the full benefit of due process of law.

For all the foregoing reasons, it is clear that the due process clause of the Fourteenth Amendment will not reach the proceedings before the Joint Committee of the New York Legislature, and the petitioner's conviction for refusal to answer questions put to him by that body is perfectly consonant with the protections of the United States Constitution.

POINT III

The eavesdropping by the prison officials did not violate the Fourth or Fourteenth Amendments to the United States Constitution [answering petitioner's Points I and II (brief, pp. 6-29)].

The petitioner contends that information utilized by the legislative committee was illegally and immorally obtained. Specifically, he claims that the eavesdropping constituted an illegal search and seizure in contravention of the Fourth Amendment to the Constitution (brief, Point I, pp. 6-13). Further, he maintains that the due process clause of the Fourteenth Amendment was violated by what he terms the "immorality of the State's conduct" (brief, Point II, pp. 13-29).

As to the Fourth Amendment

As petitioner initially admitted (petition p. 9), at the time the eavesdropping occurred in this case (February, 1957) it was "not illegal or criminal." Electronic eavesdropping was an area where technological progress had outdistanced the law. This situation was promptly and adequately rectified in New York State by legislation which became effective in July, 1957. Pursuant to Sections 738 through 745 of New York Penal Law, eavesdropping, like wiretapping, may be accomplished today only by specified law enforcement officials upon a court order or where specially justified by the exigencies of the situation.²⁵ Of course, unlike wiretapping, disclosure of an overheard conversation is not criminal under federal law.

25. See also N. Y. Code Crim. Proc. §813(b).

This Court has recently had occasion specifically to consider eavesdropping in relation to the constitutional proscription against unreasonable search and seizure. *Silverman v. United States*,²⁶ promulgated a clear standard: to constitute an unconstitutional invasion, eavesdropping must be accompanied by some physical intrusion into an area protected by the Fourth Amendment.

In *Silverman*, it will be recalled, "the eavesdropping was accomplished by means of an unauthorized physical penetration into the premises occupied by the petitioner." The penetration was made when a "spike" microphone was driven into the wall of a house, making contact with the heating apparatus which served as a conductor for sound and enabled the government agents to overhear conversations taking place throughout the house.

The facts of the *Silverman* case have no analogue here, since the record indicates that the eavesdropping in question occurred in a State prison where one of the participants was a prisoner (R 155-8) necessarily subject to the constant supervision and observation of his jailors. No home was violated here; the eavesdropping occurred in a government building where the eavesdroppers were rightfully and lawfully present. It is clear that such conditions do not meet the *Silverman* test of intrusion into a protected area.

The petitioner vainly tries to bring this case within the ambit of *Silverman* by alleging—again without any reference to the record—that the prison officials, in some un-

26. 365 U. S. 505 (1961).

explained way, represented and assured the prisoner and the petitioner that they would have complete privacy in the prison visitor's room. Not only is this allegation contrary to the laws of New York²⁷ and the regulations of the jail,²⁸ but it is substantially refuted by the record itself. For it is manifest from the overheard conversations themselves that the parties knew or suspected that they were under official surveillance. At one point, they explicitly say that they cannot talk freely there (R 315). When they do speak of significant matters, the style is elliptical, cryptic, and unmistakably guarded (R 315-31). Parts are whispered, inaudible, or in a foreign tongue. References are veiled, no names are mentioned, and the entire conversation is carried on with an evident and well-founded awareness that a prison is not a place where a prisoner can expect privacy. Clearly, even if an aura of privacy was offered by the authorities, the Lanza brothers did not accept it as such.

27. N. Y. Correction Law §500(c) in part provides:

"Convicts under sentence shall not be allowed to converse with any other person except in the presence of a keeper."

28. The N. Y. State Commission of Correction, Regulations for Management of County Jails, provide, in part:

"The law requires that visitors be carefully supervised to prevent passing in of weapons, tools, drugs, liquor and other contraband" (p. 27).

"In jails where a visitors' booth is provided, the safekeeping of prisoners, especially those held for serious crimes, will be best insured if the booths are used for visits. Where there are no booths, and where prisoners are permitted to receive visitors in the corridors or jailer's office, visits should be closely supervised. Experience has shown that laxity in supervising visitors and searching packages has resulted in escapes, assaults on officers and serious breaches of discipline" (p. 27).

"All parts of the jail should be searched for contraband at frequent irregular intervals" (p. 11).

Although the record is not clear as to where the microphone was placed in the instant case, *Goldman v. United States*,²⁹ would seem dispositive of the issues presented. In *Goldman*, the federal agents placed a "detectaphone" against the wall in a room adjacent to the one in which the conversation took place. This Court admitted the eavesdropped information, recognizing that the federal agents were lawfully present and had not intruded into an area protected by the Fourth Amendment.

As to the Fourteenth Amendment

In support of his assertion of a violation of due process in that the eavesdropping conducted here was immoral, the petitioner relies on authorities which fail to support his position.

First, he cites *Rochin v. California*,³⁰ a case which involved the violent physical invasion of the defendant's person to extract morphine tablets from his stomach. *Rochin*, in its own terms, "put to one side cases which have arisen in State courts through modern methods and devices for discovering wrongdoers and bringing them to book."³¹ Further, the scope of the *Rochin* rule has been limited to cases in which there has been an invasion of the human body effected in a "brutal" and "offensive" manner.³²

29. 316 U. S. 129 (1942).

30. 342 U. S. 165 (1952).

31. 342 U. S. at p. 174.

32. In *Breithaupt v. Abram*, 352 U. S. 435, 437 (1957).

The applicability of the *Rochin* doctrine was further limited by *Irvine v. California*.³³ In factual context similar to that of *Silverman*,³⁴ and far more aggravated than the present case, this Court held that there had been no violation of due process. The state officers in *Irvine* secreted a microphone for over a month in the defendant's home, first in a hall, next in the bedroom and finally in a closet. Each time the microphone was installed, the officers entered the defendant's home using a pass key they obtained from a locksmith. The Court noted that "[f]ew police measures have come to our attention that more flagrantly, deliberately and persistently violated the fundamental principles declared by the Fourth Amendment;" yet the Court held due process inapplicable and affirmed the conviction, stating:

"However obnoxious are the facts in the case before us, they do not invoke coercion, violence or brutality to the person, but rather a trespass to property, plus eavesdropping."³⁵

Since this Court rejected the *Rochin* due process rule in the factual situation presented in *Irvine*, no plausible argument can be made for the application of that rule here where the record establishes that no home was violated; that no trespass occurred; and that no brutality, violence or fraud was utilized.

33. 347 U. S. 128 (1954).

34. See note 25, *supra*. It is significant that the petitioner views the instant case as indistinguishable from *Silverman*.

35. Insofar as *Irvine* involved the admission at a state trial of evidence which might be regarded as the product of an unlawful search, the decision might not survive the recently announced rule of *Mapp v. Ohio*, 367 U. S. 643 (1961).

In furtherance of his due process claim the petitioner contends that *Leyra v. Denno*,³⁶ is indistinguishable from the present case. *Leyra* involved a coerced confession from a "physically and emotionally exhausted" defendant whose "ability to resist interrogation was broken to almost trance-like submission by use of the arts of a highly skilled psychiatrist." Again his reliance is misplaced.³⁷ Without belaboring the obvious, some of the principal distinctions are: first, there is no coercion, force or fraud involved in this case—the issue is eavesdropping not coerced confession; second, the evidence, or anything tainted by it, was never introduced in a prosecution against the petitioner—in fact, in this case the petitioner placed the overheard conversations in evidence at the trial; third, the petitioner was convicted of an entirely different crime than the one indicated by the overheard information; and finally, the petitioner here was given immunity from prosecution for the underlying crime.

In contrast to the repugnant atmosphere of the *Leyra* events, the present facts evince a reasonable use of state power. While it may be argued that the unauthorized eavesdropping in this case would have been illegal under the subsequently enacted law of New York, it can be just as forcefully maintained that, had the statutes been in effect at the time, the sheriff could have obtained a court order permitting the eavesdropping. For, in the light of the suspicious circumstances attending the prisoner's release on parole, efforts to learn the identities of the persons who

36. 347 U. S. 556 (1954).

37. See opinion of the Appellate Division in the instant case, R 292-298; 10 App. Div. 2d 315 (1st Dept. 1960).

may have interceded for him was hardly an arbitrary and unreasonable investigation.

In addition, the authorities cited by the petitioner to support his claim of "immorality" are not in point. In each case,³⁸ the adverse criticism was directed at an alleged interference with the attorney-client relationship—a different issue than that involved here. Moreover, the petitioner distorts the remarks of the Governor and the Committee counsel. The Committee counsel's remarks on oral argument of an appeal were likewise directed at the alleged breach of the attorney-client relationship.³⁹ Governor Hariman's comment was not directed at this case, but at uncontrolled eavesdropping. In addition, the Governor's message, which indicates that he had vetoed similar legislation in the past because it failed to make provision for law enforcement use of eavesdropping, refutes the petitioner's claim that legislation was spontaneously brought about as a result of this case.⁴⁰

In the last analysis, there is nothing inherently immoral or unethical in the use of eavesdropping equipment.

38. *Lanza v. Joint Legislative Committee*, 3 N. Y. 2d 92 (1957) cert. denied 355 U. S. 856 (1957); *Matter of Reuter (Cosentino)*, 4 App. Div. 2d 252 (1st Dept. 1957); *Lanza v. Joint Legislative Committee*, 3 App. Div. 2d 531 (1st Dept. 1957).

39. In *Lanza v. Joint Committee*, 3 N. Y. 2d 92 (1957) the New York Court of Appeals noted that "It is true, as referred to in Judge Desmond's opinion, that the committee counsel stated upon the argument that the intentional secret interception of a confidential communication between attorney and client in the counsel room of a prison is repugnant, but it is also true that he offered to the court the minutes of the committee's hearing which, he stated, would demonstrate beyond doubt that this simply did not take place here."

40. N. Y. Sessions Laws [McKinney's 1958 (p. 1837)].

Stealth and disguise are necessary and proper techniques of investigation utilized since law enforcement began. Vital evidence is not normally available except by dint of such measures. The acceptance by the New York legislature of eavesdropping, under supervised conditions,⁴¹ indicates that community morality is not offended by this special means of penetrating the guarded gates of criminal enterprise. Rather than unconstitutional "immorality," the use of electronic equipment in proper circumstances is an obligation of conscientious law enforcement. Indeed, as this Court has observed: "[m]odern community living requires modern scientific methods of crime detection lest the public go unprotected"⁴²

Conclusion

The judgment of conviction should be affirmed.

Respectfully submitted,

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41. N. Y. Penal Law, §739.

42. *Breithaupt v. Abram*, 352 U. S. 432 (1957).